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HOUSE OF REPRESENTATIVES

REPORT
105–453

FAIRNESS FOR SMALL BUSINESS AND EMPLOYEES ACT OF 1998

MARCH 18, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLING, from the Committee on Education and the Workforce, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany H.R. 3246]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 3246) to assist small businesses and labor organizations in defending themselves against government bureaucracy; to ensure that employees entitled to reinstatement get their jobs back quickly; to protect the right of employers to have a hearing to present their case in certain representation cases; and to prevent the use of the National Labor Relations Act for the purpose of disrupting or inflicting economic harm on employers, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of H.R. 3246, the Fairness for Small Business and Employees Act of 1998 (FSBEA), is to assist small businesses and labor organizations in defending themselves against government bureaucracy; to ensure that employees entitled to reinstatement get their jobs back quickly; to protect the right of employers to have a hearing to present their case in certain representation cases; and to prevent the use of the National Labor Relations Act for the purpose of disrupting or inflicting economic harm on employers.

59–006

Committee Action

H.R. 3246, the Fairness for Small Business and Employees Act of 1998, was introduced by Representative Bill Goodling on February 24, 1998. Each of the four titles of H.R. 3246 is a bill previously introduced during the 1st Session of the 105th Congress. H.R. 3246 was marked-up in the Employer-Employee Relations Subcommittee on February 26, 1998, and was ordered reported to the Education and the Workforce Committee by a roll call vote of 7 to 3. H.R. 3246 was marked up in Full Committee on March 11, 1998, and ordered reported favorably by roll call vote (yeas 23, nays 18, not voting 4).

Title I of the FSBEA is a narrowed version of H.R. 758, the Truth in Employment Act, which was introduced by Representative Harris Fawell on February 13, 1997. The bill currently has 120 cosponsors. The Subcommittee on Employer-Employee Relations held a hearing on H.R. 758 on February 5, 1998, during which testimony was received on the legislation from Mr. Jay Krupin, partner, Krupin, Greenbaum & O'Brien, Washington, DC; Mr. Thomas J. Cook, employee, Omega Electric Construction Company, Williston, Vermont; Mr. Peter C. Rousos, director of corporate human resources, Gaylord Entertainment Company, Nashville, Tennessee, testifying on behalf of the U.S. Chamber of Commerce; Mr. Peter R. Kraft, partner, Kraft & Winger, Portland, Maine; and Mr. Patrick Parcell, member, Boilermakers Local 169, Dearborn, Michigan, testifying on behalf of the Building and Construction Trades Department, AFL–CIO.

The Subcommittee on Employer-Employee Relations held a hearing on H.R. 758, the Truth in Employment Act of 1996, on October 9, 1997. Testimony was received on the legislation and on the unions' "salting" technique from Steven R. Weinstein, partner, Dunetz, Marcus, Brody & Weinstein, L.L.C., Livingston, New Jersey; Charles Fletcher, vice president, industrial relations and safety, Corey Delta Constructors, Benicia, California; Larry Cohen, senior partner, Sherman, Dunn, Cohen, Lifer & Yellig, Washington, DC, testifying on behalf of the AFL–CIO; Don Mailman, owner, Bay Electric Co., Inc., South Portland, Maine; Maurice Baskin, partner, the Venable Law Firm, Washington, DC, testifying on behalf of the Associated Builders and Contractors.

The Committee on Economic and Educational Opportunities and the Committee on Small Business held a joint field hearing on April 12, 1996, in Overland Park, Kansas, on The Practice of "Salting" and its Impact on Small Business, and heard testimony from Mr. Bill Love, president, SKC Electric, Inc., Lenexa, Kansas, accompanied by SKC Electric, Inc. employee, Mr. Richard Oberlechner; Mr. Greg Hoberock, vice president, HTH, Co., Union, Missouri; Mr. Dave Meyer, vice president, secretary, Meyer Brothers Building Co., Blue Springs, Missouri; Mr. Robert Janowitz, esq., chair, labor and employment law, Group Practice, Shook, Hardy & Bacon, Kansas City, Missouri; Mr. William Creeden, director of organizing, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Kansas City, Kansas; Mr. James K. Pease, Jr., Attorney-at-law, Pease & Ruhley, Madison, Wisconsin; and Mr. Lindell Lee, business manager, Local 124, International Brotherhood of Electrical Workers, Kansas City, Kansas.

The Committee on Economic and Educational Opportunities' Subcommittee on Oversight and Investigations held a Hearing on Union Corporate Campaign Tactics, including the tactic of "salting," on October 31, 1995. Testimony was heard from Dr. Herbert R. Northrup, professor emeritus of management, The Wharton School, University of Pennsylvania, Haverford, Pennsylvania; Ms. Sharon Purdy, secretary/treasurer, Purdy Electric, Inc., Columbus, Ohio; Mr. Barry Kindt, president, SECCO, Inc., Camp Hill, Pennsylvania; Mr. John C. Gaylor, president, Gaylor Electric Co., Carmel, Indiana; Mr. Michael McCune, CEO, Contractors Labor Pool, Inc., Reno, Nevada; and Professor Risa Lieberwitz, School of Industrial and Labor Relations, Cornell University, Ithaca, New York.

The Subcommittee on Employer-Employee Relations held a Hearing on the National Labor Relations Board (NLRB) Reform on September 27, 1995, which included testimony on "salting" and its impact, from Rosemary M. Collyer, former General Counsel, NLRB, attorney-at-law, Crowell & Moring, Washington, DC; Charles Craver, professor of law, George Washington University Law School, Washington, DC; Larry K. Durham, president and CEO, Durham Transportation, Inc., Austin, Texas; Mark R. Thierman, attorney-at-law, Theirman Law Firm, San Francisco, California; and David J. Tippeconnic, president and CEO, The UNO–VEN Company, Arlington Heights, Illinois.

Title II of the FSBEA is formerly H.R. 1595, the Fair Hearing Act, introduced by Representative Harris Fawell on May 14, 1997. The Act currently has 40 cosponsors. H.R. 1595 was addressed at the Employer-Employee Relations Subcommittee's February 5, 1998, hearing on Legislation to Provide Fairness for Small Businesses and Employees: H.R. 758, H.R. 1595, H.R. 1598, H.R. 2449. Testimony on H.R. 1595 and the issue of single location bargaining unit determinations was heard from Mr. Jay Krupin, partner, Krupin, Greenbaum & O'Brien, Washington, DC; Mr. Peter C. Rousos, director of corporate human resources, Gaylord Entertainment Company, Nashville, Tennessee, testifying on behalf of the U.S. Chamber of Commerce; Ms. Arlene Goodman, president, Goodman & Company, Brentwood, Tennessee; and Mr. Richard Griffin, general counsel, International Union of Operating Engineers, Washington, DC.

Title III of the FSBEA is formerly H.R. 1598, the Justice on Time Act, introduced by Representative Bill Goodling, on May 14, 1997. The Act was addressed at the Employer-Employee Relations Subcommittee's February 5, 1998, hearing by witnesses Mr. Jay Krupin, partner, Krupin, Greenbaum & O'Brien, Washington, DC; Mr. Peter C. Rousos, director of corporate human resources, Gaylord Entertainment Company, Nashville, Tennessee, testifying on behalf of the U.S. Chamber of Commerce; and Mr. Richard Griffin, general counsel, International Union of Operating Engineers, Washington, DC.

Title IV of the FSBEA is formerly H.R. 2449, the Fair Access to Indemnity and Reimbursement (FAIR) Act, introduced by Representative Harris Fawell on September 10, 1997. The Act currently has 38 cosponsors. H.R. 2449 was addressed at the Employer-Employee Relations Subcommittee's February 5, 1998, hearing by witnesses Mr. Jay Krupin, partner, Krupin, Greenbaum & O'Brien, Washington, DC; Mr. Peter C. Rousos, director of corporate human resources, Gaylord Entertainment Company, Nashville, Tennessee, testifying on behalf of the U.S. Chamber of Commerce; and Mr. Richard Griffin, general counsel, International Union of Operating Engineers, Washington, DC. H.R. 2449 was also brought into the discussions of labor issues by Employer-Employee Relations Subcommittee Chairman Harris Fawell at two earlier EER Subcommittee hearings: Hearing on H.R. 758, the Truth in Employment Act of 1996, on October 9, 1997, and Hearing on Review of the National Labor Relations Board, on September 23, 1997.

SUMMARY

H.R. 3246, the Fairness for Small Business and Employees Act (FSBEA), is a bill containing four, narrowly-drafted titles addressing four specific problems with the National Labor Relations Act. H.R. 3246 recognizes that Congress should be doing everything in its power to create an environment where small employers can be successful in what they do best-creating jobs and being the engine that drives America's economic growth. The Act also recognizes that the National Labor Relations Board, which is supposed to be a neutral arbiter of labor disputes, is applying the NLRA in a way that not only harms small employers—businesses and unions—but also does a great disservice to hardworking men and women who may have been wrongly discharged.

Title I of the FSBEA is a narrowed version of H.R. 758, the Truth in Employment Act, and addresses the practice of professional agents and union employees being sent into non-union workplaces under the guise of seeking employment-commonly known as "salting." This title amends the National Labor Relations Act to make clear that an employer is not required to hire someone who is not a "bona fide" employee applicant, in that the applicant's primary purpose in seeking the job is to further other employment or agency status. Simply put, if someone is not at least "half" motivated by a desire to be a genuine, hardworking employee, the employer should not have to hire them.

Title II is formerly H.R. 1595, the Fair Hearing Act, which requires the NLRB to conduct hearings to determine when it is appropriate to certify a single location bargaining unit where a labor organization attempts to organize employees at one or more facilities of a multi-facility employer. This title simply requires the Board to consider all of the relevant factors-as the agency has done for decades-in making a unit determination. While the Board recently withdrew its proposed rule to implement a "one-size-fits-all" rule for determining the appropriateness of a single location bargaining unit, Title II would statutorily protect an employer's right to have a fair hearing to present evidence in support of its side of the case.

Title III of the FSBEA is formerly H.R. 1598, the Justice on Time Act. Title III is intended to help remedy situations in which employees often wait more than a year for the Board to render a decision regarding their discharge. The legislation requires the NLRB to issue a final decision within one year on all unfair labor practice complaints where it is alleged that an employer has discharged an employee in an attempt to encourage or discourage union membership. Expeditious resolution of these complaints would benefit all parties not only by ensuring swift justice and timely reinstatement of a wronged employee, but also by reducing the costs of litigation and backpay awards. The title contains an exemption from the one-year time limit for "extremely complex" cases, and requires the Board to report annually to the House Education and the Workforce Committee and the Senate Labor and Human Resources Committee on cases not disposed of within one year, including reasons for the delay and the Board's recommendations for prompt resolution.

Title IV of the Act is formerly H.R. 2449, the Fair Access to Indemnity and Reimbursement (FAIR) Act, which requires the NLRB to pay the attorney's fees and expenses to small employers of modest means—including businesses and labor organizations—who prevail in cases before the NLRB. Title IV applies to employers having not more than 100 employees and a net worth of not more than $1.4 million. These eligibility limits represent a mere fifth of the 500 employee/$7 million net worth limits of the Equal Access to Justice Act (EAJA), legislation passed in 1980 which was supposed to have leveled the playing field for small employers facing unwarranted actions brought by the federal government. However, the EAJA is underutilized at the Board and is simply not working for the nation's small employers.

Title IV would make sure that the Board considers carefully the merits of an action before bringing it against a small entity with few resources, and would ensure that these smaller employers have an incentive to fight a case of questionable merit.

Committee Views

TITLE I—TRUTH IN EMPLOYMENT

"Salting" abuse is the placing of trained professional organizers and agents in a non-union facility to harass or disrupt company operations, apply economic pressure, increase operating and legal costs, and ultimately put the company out of business. The object of the union agents is accomplished through filing, among other charges, unfair labor practice charges with the National Labor Relations Board. As the five hearings the Committee held on this issue in the 104th and 105th Congresses showed, "salting" is not merely an organizing tool, but has become an instrument of economic destruction aimed at non-union companies that often has nothing to do with organizing.

As a former "salt" from Vermont testified before the subcommittee: [1]

> [Salting] has become a method to stifle competition in the marketplace, steal away employees, and to inflict financial harm on the competition. Salting has been practiced in Vermont for over six years, yet not a single group

[1] February 5, 1998, written statement of Thomas J. Cook, before the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce, p. 1.

> of open shop electrical workers has petitioned the local union for the right to collectively bargain with their employers. In fact, as salting techniques become more openly hostile (with the appearance of paid organizers who willfully undermine the flow of productivity), most workers view these activities as a threat to their ability to work. In a country where free enterprise and independence is so highly valued, I find these activities nothing more than legalized extortion.

A former NLRB field attorney testified that, from his experience, "salts have no intention of organizing a company by convincing the co-workers that unions are a good thing for them. Instead, once a salt enters the workplace, that individual engages in a pattern of conduct to disrupt the workplace; to gather information about the employer to feed to the union; to disrupt projects; and ultimately to file charges with the National Labor Relations Board."[2] Another witness quoted directly from the International Brotherhood of Electrical Workers' organizing manual, which states that the goal of the union salt is to "threaten or actually apply the economic pressure necessary to cause the employer to raise his prices, scale back his business activities, leave the union's jurisdiction, go out of business and so on."[3]

Hiding behind the shield of the National Labor Relations Act, unions "salt" employers by sending agents into non-union workplaces under the guise of seeking employment. These "salts" often try to harm their employers or deliberately increase costs through various actions, including sabotage and frivolous discrimination complaints with the NLRB. When unions send "salts" into a workplace, these agents often state openly that their purpose is to advance union objectives by organizing the employer's workforce. If an employer refuses to hire the union agents or members, the union files unfair labor practice charges.

Alternatively, if the "salts" are hired by the employer, they often attempt to persuade bona fide employees of the company to sign cards supporting the union. The union agents also often look for other reasons to file unfair labor practice charges, solely for purposes of imposing undue legal costs on the employer they are seeking to organize.

As the U.S. Chamber of Commerce testified before the subcommittee, "In Louisiana [for example], Tri-Parish Electric, a company with six employees, was forced out of business as a result of

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[2] Hearing on H.R. 758, the Truth in Employment Act of 1996, before the Subcommittee on Employer-Employee Relations, 105th Cong., 1st Sess., p. 6 (October 9, 1997) (Serial No. 105–52).

[3] Ibid. See also, Hearing on the National Labor Relations Board Reform, before the Employer-Employee Relations Subcommittee of the House Committee on Economic and Educational Opportunities, 104th Cong., 1st Sess., p. 44 (September 27, 1995) (Serial No. 104–44) ("The IBEW program is one bent on the involuntary submission of innocent and law-abiding employers to the union, or the employer's financial destruction. By perverting the NLRB process in this manner, the IBEW is threatening two of the core beliefs that this country treasures: freedom and the entrepreneurial spirit"); Joint Hearing on the Practice of "Salting" and Its Impact on Small Business, before the Committee on Small Business and the Committee on Economic and Educational Opportunities, 104th Cong., 2nd Sess., p. 20 (April 12, 1996) (Serial No. 104–71/104–51) (labor attorney testifying that "I think that salts differ fundamentally from other employees. They are just temporarily there on an assignment, a mission for the union. They are working for the union. When they are done doing * * * what duties they have been given by the union, they either return to the work for the unionized employers or they are sent on to another salting assignment").

a salting campaign and the frivolous charges that ensued. Clearly, the drafters of the 1935 National Labor Relations Act did not intend this result. The Act was not intended as a device to circumvent the will of employees, to strangle businesses into submission to further a union's objectives, or to put nonunion employers out of business."[4] One construction company testified that it had to spend more than $600,000 in legal fees from one salting campaign, with an average cost per charge of more than $8,500.[5] Beyond legal fees, one employer testified, "it would be impossible to put a dollar amount on the pain and suffering caused by the stress of the situation to a small company like ours who does not have the funds to fight these charges."[6]

Thus, under current law, an employer must choose between two unpleasant options: either hire a union "salt" who is there to disrupt the workplace and file frivolous charges resulting in costly litigation, or deny the "salt" employment and risk being sued for discrimination under the NLRA.

Title I of the Fairness for Small Business and Employees Act of 1998 (FSBEA) would protect the employer by making it clear that an employer is not required to hire any person who is not a "bona fide" employee applicant. The title states that someone is not a "bona fide" applicant if such person "seeks or sought employment with the employer with the primary purpose of furthering other employment or agency status." Simply put, it is the Committee's view that if someone wants a job, but at least 50 percent of their intent is not to work for the employer, then they should not get the job and the employer has not committed an unfair labor practice if they refuse to hire the person.

As drafted, Title I is very narrow legislation simply removing from the protection of Section 8(a) of the NLRA a person who seeks a job without at least 50 percent motivation to work for the employer. At the same time, the legislation recognizes the legitimate role for organized labor, and it would not interfere with legitimate union activities. Title I has a proviso making clear that it does not affect the rights and responsibilities available under the NLRA to anyone, provided they are a bona fide employee applicant. Employees and bona fide applicants will continue to enjoy their right to organize or engage in other concerted activities under the NLRA, and, employers will still be prohibited from discriminating against employees on the basis of union membership or union activism.

The legislation sets up a test that the NLRB general counsel must utilize before allowing a Section 8 "salting" charge to go forward. The test involves examining the intent of the individual who is seeking employment. So long as the "primary purpose" of the individual is not to further employment or agency status with someone other than the employer with whom the individual is applying, then they are a "bona fide" employee applicant and the charge

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[4] February 5, 1998, written testimony of Peter C. Rousos, on behalf of the U.S. Chamber of Commerce, before the Employer-Employee Relations Subcommittee of the House Education and the Workforce Committee, p. 3.

[5] Hearing on H.R. 758, the Truth in Employment Act of 1996, before the Subcommittee on Employer-Employee Relations, 105th Cong., 1st Sess., p. 8 (October 9, 1997) (Serial No. 105–52).

[6] Hearing on Union Corporate Campaign Tactics, before the Subcommittee on Oversight and Investigations of the House Committee on Economic and Educational Opportunities, 104th Cong., 1st Sess., p. 88 (October 31, 1995) (Serial No. 104–45).

should not be dismissed by the general counsel because of Title I. In testifying against the legislation, an active "salt" told the subcommittee, "I do good work. I work hard," and that he is "a worker who knew his rights, did a good job, and urged other workers to organize and unionize." [7] The legislation is not meant to impact individuals such as this, who are clearly at least half motivated to be a good employee.

It has been alleged by some throughout the course of the many hearings on "salting" that this legislation overturns the Supreme Court's decision in *NLRB* v. *Town & Country Electric, Inc*.[8] However, Title I in fact reinforces the narrow holding of *Town & Country.* The Court held only that paid union organizers can fall within the literal statutory definition of "employee" contained in Section 2(3) of the NLRA.[9] The Court did not address any other legal issues, but the effect of the decision is to uphold policies of the NLRB which subject employers to unwarranted union harassment and frivolous complaints.

Title I does not change the definition of "employee" or "employee applicant" under the NLRA, it simply would change the Board's enforcement of Section 8 "salting" cases by declaring that employers may refuse to hire individuals who are not at least half motivated to work for the employer. So long as even a paid union organizer is at least 50 percent motivated to work for the employer, he or she cannot be refused a job pursuant to Title I. As Maury Baskin, general counsel for Associated Builders and Contractors, testified before the subcommittee, the legislation "does not seek to overrule the Supreme Court's *Town & Country* case. It would return enforcement of the Act to a policy consistent with the *Lechmere case.*" [10]

Thus, Title I establishes a test which does not seek to overrule *Town & Country* and does not infringe upon the legitimate rights of bona fide employees and employee applicants to organize on behalf of unions in the workplace. Indeed, the Supreme Court's holding that an individual can be the servant of two masters at the same time is similarly left untouched.[11] In fact, it is the acknowledgment that an applicant may in fact be split in motivation between an employer and a union that gives rise to the need for examining an applicant's motivation—a "primary purpose" test that the NLRB general counsel and courts will apply. The test is intended to apply to the motivation of the individual at the time he or she attempted to secure employment.

The focus of Title I is not on the individual's mere support for unionization, but on the individual's furtherance of employment or agency status with someone other than the employer with whom

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[7] February 5, 1998, written testimony of Patrick Parcell, on behalf of the AFL-CIO's Building and Construction Trades Department, before the Employer-Employee Relations Subcommittee of the Education and the Workforce Committee, pp. 2–3.

[8] 116 S.Ct. 450 (1995).

[9] Id. at 457.

[10] Hearing on H.R. 758, the Truth in Employment Act of 1996, before the Employer-Employee Relations Subcommittee, p. 14 (October 9, 1997) (Serial No. 105–52). In *Lechmere, Inc.* v. *NLRB,* 502 U.S. 527 (1992), the Supreme Court held that outside union representatives can be denied access to an employer's workplace, and reaffirmed that Section 7 of the NLRA was intended to protect the rights of bona fide employees, not outside union organizers.

[11] The Court cited *Restatement (Second) of Agency,* Section 226, at 498, for the proposition that a "person may be the servant of two masters * * * at one time as to one act, if the service to one does not involve abandonment of the service to the other." Id., at 456.

the individual is seeking a job. The term "employment or agency status" is intended to refer to the common law definitions of employee or agency status, as the Supreme Court and the NLRB have repeatedly construed these terms over the course of decades. As the Court noted in *Town & Country,* the ordinary definition of "employee" refers to "a person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how work is to be performed."[12] Similarly, an "agent" is well defined by common law and NLRB decisions as "one who agrees to act subject to a principal's control."[13]

Thus, only individuals who fall within these narrow categories due to a union's control over their activities could be denied employment by an employer, and only if they seek or sought employment with the "primary purpose" of furthering their union employment or agency status.

Regarding the standard of proof involved in determining an individual's motivation under Title I, the test that the NLRB general counsel and courts would apply is not a new one. In *Wright Line, Inc.,*[14] the NLRB established a uniform method of proving discriminatory motivation, in the context of Section 8(a)(3) of the NLRA. The Board has held that an employer will not be found to have violated the NLRA if the employer's action towards an employee would have occurred even in the absence of protected conduct. Under *Wright Line,* the general counsel bears the burden of establishing a prima facie case that an employee's "protected activity" was a substantial or motivating factor for an employer's adverse action. The employer can rebut this showing, however, by demonstrating that it would have taken the same action against the employee even in the absence of the protected conduct.[15]

Under Title I, the act of seeking employment with the "primary purpose" of furthering another employment or agency status would not be "protected activity" under the NLRA. Therefore, the general counsel would bear the burden as part of his prima facie case or showing that the employee applicant on whose behalf the charge of discrimination has been filed is not a person who has sought employment with such a primary purpose—that the applicant would have sought the job even in the absence of his or her salting activity. In the event the general counsel does make out a prima facie case with the necessary element that the applicant still would have sought the job, the employer would still be entitled to rebut the prima facie case with contrary evidence.

In sum, forcing employers to hire union business agents or employees, who are primarily intent on disrupting or even destroying employers' businesses, does not serve the interests of bona fide employees under the NLRA and hurts the competitiveness of small businesses. Title I does not prohibit organizers from getting jobs. Title I simply removes an incentive to use the NLRA as a weapon

[12] 116 S.Ct. at 454.

[13] *Restatement (Second) of Agency,* Section 226, Comment a (1957). See also, *Cambridge Wire Cloth Co., Inc.,* 256 NLRB 1135, 1139 (1981) (mere participation in union activities such as card solicitation or organizing committee does not constitute one an agent of a union).

[14] 251 NLRB 1083 (1980), enforced 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

[15] 662 F.2d at 905.

against an employer by persons who have little interest in employment. All the legislation does is give the employer some comfort that it is hiring someone who really wants to work for the employer. As long as the "salt" is applying to do a good job for the employer, Title I does nothing but protect the employee applicant, and the employer who has a right to have a workforce that is going to work for the good of the company. Title I returns a sense of balance to the NLRA which is being undermined by the Board's current policies.

TITLE II—FAIR HEARING

When a labor organization attempts to organize employees at a single facility of an employer that has multiple facilities, the issue often arises as to whether the bargaining unit proposed by the union should include other employees at other facilities who share a "community of interest" with the employees at the separate facility.

The current practice of the National Labor Relations Board is to presume that employees at a single facility form an appropriate unit, but to allow an employer to rebut that presumption by showing a functional integration so substantial as to negate the separate identity of the single-facility unit. In making its findings on this issue, the Board considers such factors as: central control over daily operations and labor relations, including the extent of local autonomy; similarity of skills, functions, and working conditions; degree of employee interchange; distance between locations; and bargaining history, if any.[16] The Board applies these factors on a case-by-case basis in situations where the employer disputes the organizing union's contention that the bargaining unit should be confined to a single facility.

Title II of the FSBEA amends Section 9(c) of the National Labor Relations Act by adding a sentence at the end which requires the National Labor Relations Board to provide for a hearing upon due notice to determine the appropriateness of a bargaining unit when the Board receives a petition for an election requesting the Board to certify a unit which includes the employees employed at one or more facilities of a multi-facility employer.

The legislation directs the Board to consider "functional integration, centralized control, common skills, function and working conditions, permanent and temporary employee interchange, geographical separation, local autonomy, the number of employees, bargaining history, and other such factors as the Board considers appropriate."

As made clear at the February 5, 1998, Employer-Employee Relations Subcommittee hearing,[17] the current state of the law already gives organized labor a presumption in favor of the appropriateness of bargaining units at single site locations, and it is always the employer's burden to rebut that presumption by show a "wider net"

[16] *J & L Plate,* 310 NLRB 429 (1993).

[17] Hearing on Legislation to Provide Fairness to Small Business and Employees: H.R. 2449; H.R. 1598; H.R. 1595; and H.R. 758, before the Subcommittee on Employer-Employee Relations, 105th Cong., 2nd Sess. (February 5, 1998).

should be cast by the National Labor Relations Board in making its bargaining unit determination.

Title II simply requires the NLRB to consider all of the relevant factors—as the Board has done for decades—in making its unit determination. The legislation recognizes that the only way to determine which bargaining unit fits which set of circumstances is to gather facts—and the only way to gather facts is to require the NLRB to hold a hearing.

Thus, the legislation codifies an employer's ability to present evidence supporting its side of the case. As Arlene Goodman testified before the Employer-Employee Relations Subcommittee, Title II is "equitable, simple, straightforward, and does nothing more than codify the decades-long practice of the NLRB in resolving, by hearing, disputes as to the appropriateness of the bargaining unit in cases involving multi-facility employers," and, "would not change existing law, but would preserve the status quo." [18] It is the Committee's view that bargaining unit determinations, by their nature, require the type of fact-specific analysis that only case-by-case adjudication allows. Title II recognizes both the realities of human resource management in today's competitive economic environment and the complexity of unit determinations. The legislation does not attempt to define when a single location bargaining unit is appropriate, rather, it merely requires the Board to consider all the relevant factors.

While codifying an employer's right to a hearing, Title II is also a response to the NLRB's ill-conceived attempt to craft a "one-size-fits-all" rule that would have applied to virtually every industry, for determining the appropriateness of single location bargaining units. Board Chairman William Gould proposed on September 27, 1995, new regulations that further would tilt the playing field in favor of unions which attempt to organize a multi-location employer's workforce through incremental steps.[19]

While the NLRB voted 4 to 1 on February 18, 1998, to withdraw the proposed rule,[20] there is nothing to prevent the agency from resurrecting the rule in the future, and under current law, there is no absolute guarantee the employer will be granted a hearing.

The Board's proposed rule would have established conclusively that employees at an unrepresented single location would be the appropriate bargaining unit as long as there are 15 or more employees in the requested unit at the location; no other location of the employer is within one mile of the requested location; and at least one supervisor is present at the location for a regular and substantial period.[21] As Ms. Goodman testified, "If these three criteria are met, then absent highly exceptional circumstances, the employer would no longer be entitled to present evidence, testi-

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[18] February 5, 1998, written testimony of Arleen Goodman, president, Goodman & Company, franchise development and small business consultants, on behalf of the International Franchise Association, before the Employer-Employee Relations Subcommittee of the House Committee on Education and the Workforce, p. 2.

[19] 60 FR 50146, Notice of Proposed Rulemaking, "Appropriateness of Requested Single Location Bargaining Units in Representation Cases" (September 28, 1995).

[20] Withdrawal of Proposed Rulemakings, NLRB Billing Code 7545–01 (February 18, 1998).

[21] 60 FR 50146, 50157. As noted above, the NLRB's proposed rule would apply to "all employers over which the Board asserts jurisdiction," but specifically exempts "public utilities; employers engaged primarily in the construction industry; and employers in the maritime industry in regard to their ocean-going vessels." 60 FR 50157.

mony, and arguments in support of its position as to why the single facility should not be deemed the appropriate bargaining unit."[22]

Such a mechanistic rule would tilt the playing field even more in favor of organized labor than current law, would ignore realities of human resource policies central to business growth, and would simply create an unfair system for the sake of expediency.[23] As attorney Jay Krupin testified before the Employer-Employee Relations Subcommittee: "The single site rule assumes that all businesses operate the same cookie-cutter way with no consideration given to the important differences in practices, policies, hiring standards and benefits of each employer" and is "antithetical to a competitive economy which U.S. laws foster and encourage."[24] It is the Committee's view that limiting a unit determination to the three factors proposed by the Board would ignore relevant factors and potentially undermine the ability of employers to develop flexible solutions to the needs and demands of their work forces, and would increase costs and complexity where centralized personnel policies are maintained by employers with numerous locations.[25]

As Ms. Goodman pointed out in her testimony before the subcommittee:[26]

> Most multi-facility employers, especially those in the retail industry, utilize centralized wage and benefit structures, hiring policies, training and other personnel policies. Most multi-facility employers also utilize centralized advertising, financial controls, budgeting, operational policies, promotions, transfers, and personnel, benefits and work rules policies. Under these circumstances, a single facility is not a stand-alone, independent operation, rather it is but one component of a multi-facility employer's business and it is very much operated under centralized policies and procedures. These very issues have been the focus of the individualized case-by-case approach that the NLRB has utilized for four decades in determining when a single facility of a multi-facility employer is or is not appropriate for bargaining unit purposes.

The Board and those supportive of imposing a simplistic three-pronged approach argue that the rulemaking in the area of bargaining determinations was upheld by the Supreme Court in 1991 and should therefore be expanded to the arena of single location unit determinations.[27] However, the Supreme Court's decision in

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[22] February 5, 1998, written testimony of Arleen Goodman, supra note 18, p. 3.

[23] The notice of proposed rulemaking stated that "were the Board to establish a rule specifying under which fact situations a single location unit will automatically be found appropriate, there would be considerably less litigation over the significance or lack of significance of these facts, and the factors to which they relate." 60 FR 50146, 50147. Congress, however, wisely attached riders to the Labor-HHS appropriations bills during the 1996, 1997, and 1998 cycles to prevent the NLRB from spending any money to implement its proposed rule.

[24] February 5, 1998, written testimony of Jay P. Krupin, partner, Krupin Greenbaum & O'Brien, LLC, before the Employer-Employee Relations Subcommittee of the House Education and the Workforce Committee, p. 4.

[25] Even the NLRB admits a rule "may not be appropriate for all representation cases." 60 FR 50146, 50147.

[26] February 5, 1998, written testimony of Arlene Goodman, supra note 18, at 4–5.

[27] February 5, 1998, written testimony of Richard Griffin, general counsel, International Union of Operating Engineers, before the Employer-Employee Relations Subcommittee of the House Committee on Education and the Workforce, p. 2.

American Hospital Ass'n v. *NLRB*[28] upheld a narrowly crafted rule applying only to acute care hospital units, while the proposed rule concerning single site units would apply to all industries currently under the Board's jurisdiction, excluding utilities, construction, and sea-going crews in the maritime industry. The rule would take away an employer's ability to present its side of the case, and, while it would reduce case load and NLRB expense, such would be achieved at the cost of shoehorning this nation's employers into a rigid rule ignoring realities of the workplace.

Supporters of the narrow rule also allege that it would streamline the process at little expense to substantive case law, arguing that the three factors included in the rule are the only ones which have made a material difference in the outcome of cases.[29] This view is incorrect, and illustrates the need for considering all relevant factors as codified by Title II of the FSBEA. Indeed, the proposed rule would upset certain precedent, and ignoring certain factors in unit determinations would clearly change the outcome of unit determination cases. For example, in *Globe Furniture Rental, Inc.*,[30] the Board ruled that an appropriate bargaining unit would have to include 75 employees at all five of the company's Detroit area facilities. The Board based its decision primarily on the fact that even though each facility had a store manager, the critical decisions regarding hiring and firing, discipline, wages, hours, inventory, financial transactions, and numerous other important matters were handled by the company's vice president and the central office staff.[31]

Similarly, in *NLRB* v. *Chicago Health & Tennis Clubs, Inc.*,[32] the Seventh Circuit held that the NLRB erred when it determined the most relevant factors. The court found evidence that indicated the employer was highly integrated, and that personnel, labor-related policies, and actual operations were centrally located. Factors considered included functional integration, similarity of wages and working conditions, centralized management and bargaining history[33]—all factors not included in the Board's proposed rule.

In addition to casting aside factors long considered relevant to unit determination, the NLRB's proposed rule is unfair as it is one-sided in its application. The NLRB expressly states that the new rule would only apply if it is invoked by the union. If a union seeks to organize multiple facilities, the employer is precluded from using the rule to limit the organizing to a single facility.[34] Similarly, an employer could not invoke the rule in an attempt to decertify the employees at a single facility who are part of a multi-facility bargaining unit.[35] The reason unions prefer smaller units is because they are easier to organize, as it is easier to get members of the unit to agree on a mutually advantageous course of collective bar-

[28] 499 U.S. 606 (1991).
[29] 60 FR 50146, 50152.
[30] 298 NLRB 288 (1990).
[31] Id.
[32] 567 F.2d 331 (7th Cir. 1977).
[33] Id., at 336–338. Significantly, the Court noted that the Board, in making unit determinations, "must effect the policy of the [NLRA] to assure employees the fullest freedom in exercising their rights, *yet at the same time respect the interest of an integrated multi-unit employer in maintaining enterprise-wide labor relations.*'" Id. at 335 [Emphasis added. Citations omitted].
[34] 60 FR 50146, 50151.
[35] Id.

gaining—which is why the proposed rule was so attractive to them. Unions, Mr. Krupin told the Employer-Employee Relations Subcommittee, "are not so concerned with whether the unit is appropriate to meet the employees' interests in bargaining or its effect on the employer's operations, but are singularly focused on their ability to win representational status." [36] Furthermore, Mr. Krupin testified, "Experience has shown that unions' proposed units do not necessarily make practical business sense. Rather, unions focus on the size of the bargaining unit in the organizational process. Generally, the smaller the unit, the greater the chance for success in organizing, particularly in a service industry operation." [37]

In a 10–page dissent to the NLRB's proposed rule authored before his departure, former-NLRB Board Member James M. Stephens stated that the Board has shown no serious problems with existing law, and no compelling reasons to change it.[38] "I see more to be lost than gained by the proposed rule," Stephens said, adding that the "NLRB's energies would be better directed elsewhere." [39]

Title II simply writes into law the Board's decades-long practice of scrupulously analyzing a series of critical factors in unit determination.[40] Title II ensures that the Board will not resurrect its proposed rule in the future, and guarantees an employer's right to a hearing to present factors supporting its side of a dispute over the appropriateness of a proposed single location bargaining unit.

As Peter C. Rousos testified before the Employer-Employee Relations Subcommittee, "Employers and employees should not be denied the due process right to have the NLRB consider, as intended by Congress, the unique aspects of each situation." [41] Furthermore, "It is incongruous to American ideals," Mr. Krupin told the subcommittee, "to muzzle a party, such as employers, from presenting facts to support an appropriate unit determination." [42]

TITLE III—JUSTICE ON TIME

Section 8(a) of the National Labor Relations Act makes it an unfair labor practice for an employer to discharge or to otherwise discriminate against an employee in regard to hiring or tenure of employment or any term or condition of employment in order to encourage or discourage membership in a labor organization.[43] Similarly, Section 8(b) makes it an unfair labor practice for a labor or-

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[36] February 5, 1998, written testimony of Jay P. Krupin, supra note 24 at p. 3.
[37] Id.
[38] August 25, 1995, memorandum from James M. Stephens, former-NLRB Member, to the Board, delivered to the NLRB's Office of the Executive Secretary for inclusion in the public rulemaking record.
[39] Id. at page 5.
[40] Significantly, NLRB Member Charles Cohen attached a statement to the proposed rule in which he pointed out that having reviewed the comments received in response to the Board's June 1, 1994, Advance Notice of Proposed Rulemaking (59 FR 28501), he was "still not firmly persuaded that there is a need for a rule." 60 FR 50146, 50157. Cohen noted that the longstanding multi-factorial approach allows the well-known relevant factors to be applied to accommodate the peculiarities of individual cases; that the Board decisions, with rare exceptions, have been upheld by the courts; that the stipulation rate remains high; and that even the litigated cases are usually resolved within a reasonably short period of time. Id.
[41] February 5, 1998, written testimony of Peter C. Rousos, director of corporate human resources, Gaylord Entertainment Corporation, on behalf of the U.S. Chamber of Commerce, before the Employer-Employee Relations Subcommittee of the House Education and the Workforce Committee, p. 4.
[42] February 5, 1998, written testimony of Jay P. Krupin, supra note 24 at p. 4.
[43] 29 U.S.C. 158(a).

ganization to "cause or attempt to cause an employer to discriminate against an employee" for the same purpose.[44]

An employee who believes he or she has been discriminated against in violation of Section 8 may file a charge with the NLRB.[45] From then on, the vindication of the individual's rights is in the hands of the federal government, in the form of the NLRB. How quickly the case is investigated and a decision is made, and therefore how soon the complainant may begin to put his or her life back together, and in many cases how soon the employer can remove the uncertain legal and financial liability associated with a pending charge, is in the hands of the NLRB. The old saying, "justice delayed is justice denied" remains as true today as ever.

Unfortunately, the NLRB's record of timely resolution and decision of unfair labor practice cases is dismal. According to the NLRB's own figures, in each year since 1977, the *median* time the Board took to render a final decision in unfair labor practice cases has exceeded one year.[46]

Fiscal year	Median time (days)	Fiscal year	Median time (days)
1977	397	1987	709
1978	429	1988	762
1979	483	1989	736
1980	484	1990	680
1981	490	1991	586
1982	633	1992	509
1983	658	1993	535
1984	660	1994	503
1985	720	1995	586
1986	769	1996	591

Ironically, during that same time, the NLRB's workload has decreased substantially. This is true whether measured by the number of unfair labor practice charges filed with the Board, the number of complaints issued by the NLRB General Counsel, or the number of decisions in unfair labor practice cases issued by the NLRB. For example, in 1980, the NLRB received 44,063 unfair labor practice charges and issued 6,230 unfair labor practice complaints. In 1996, the Board received 33,107 unfair labor practice charges and issued 3,154 unfair labor practice complaints.[47]

Some (including representatives of the NLRB) have suggested that the slowness and delay in the Board's handling of unfair labor practice cases is due to the NLRB not being appropriated enough funding in recent years by Republican-controlled Congresses. In fact, the NLRB's funding has increased steadily, from $112 million in 1980 to $175 million in 1998. Even in inflation-adjusted dollars, the NLRB's funding has outpaced its caseload by a substantial amount. While the Board's funding decreased by 15 percent in inflation-adjusted dollars between 1980 and 1995, the number of unfair labor practice charges it received during the same time frame decreased by 23 percent, and the number of unfair labor practice

[44] 29 U.S.C. 158(b).
[45] 29 U.S.C. 160.
[46] "NLRB Justification of Appropriations Estimates for Committee on Appropriations for Fiscal Year 1998".
[47] NLRB Annual Reports; and "NLRB: Agency in Crisis", by Daniel Yager, pp. 17–21.

complaints the NLRB issued decreased by 42 percent.[48] Simply put, the argument that the Board's slowness and delay in deciding unfair labor practice cases is due to recent years' appropriations is not credible.

The NLRB itself has recognized the need to improve the timeliness of decisions on unfair labor practice cases. The NLRB's "Strategic Plan for Fiscal Years 1997–2002," submitted to Congress in September 1997, pursuant to the Government Performance and Results Act of 1993, describes the agency's goal to gradually reduce and eliminate the number of cases pending before the Board for more than 2 years.[49] As of July 1997, 49 unfair labor practice cases had been pending before the Board for more than 2 years, including 23 cases which had been pending for more than 3 years.[50] The Board's goal, according to the strategic plan, is to gradually reduce the number of these cases so that by the end of FY 1999 no cases would be pending at the Board for more than 3 years, by the end of FY 2000 no cases would be pending before the Board for more than 30 months, and by the end of FY 2001, no cases would be pending before the Board for more than 2 years.[51]

While the Committee acknowledges the Board's attention to the issue of delay in resolving unfair labor practice cases as part of its 5-year strategic plan under GPRA, the Committee simply must say that setting a goal of resolving unfair labor practice cases two years after they have been pending at the Board is not good enough. American workers and employers have a right to expect better, more timely, justice.

Title III of H.R. 3246 establishes in law the goal that the NLRB must have with regard to certain unfair labor practice cases. In cases brought under Section 8(a)(3) or 8(b)(2) of the National Labor Relations Act, in which the charge alleges unlawful discharge of an employee, the Board must issue its findings of fact and order (either granting remedy to the employee or dismissing the complaint) within one year of the time that the charge is filed.

The Committee believes that this is a reasonable goal and time limit for deciding cases in which an individual worker has been discharged, allegedly for illegal reasons. There are and will be, however, some cases in which the facts may be complex or difficult to discern, or where one or the other party to the case is not forthcoming with information necessary to resolve the case, which may make it impossible for the Board to reach this goal. In those cases, the bill requires that the Board report annually to this Committee and to the Senate Committee on Labor and Human Resources regarding any cases pending for more than one year, along with an explanation of the factors contributing to the delay and recommendations for reaching prompt resolution of the cases.

During the February 5, 1998, hearing before the Subcommittee on Employer-Employee Relations, the General Counsel of the International Union of Operating Engineers, Mr. Richard Griffin, testifying on behalf of the AFL-CIO, testified that, "We wholeheartedly agree with the premises of this bill * * * [but] In our view, while

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[48] Ibid.
[49] NLRB's "Government Performance and Results Act of 1993 Strategic Plan."
[50] Ibid., p. 8.
[51] Ibid., p. 23.

[Title III] is a step in the right direction, it does not go far enough to address the critical issue the bill identifies." Mr. Griffin went on to suggest several additional provisions, such as making NLRB orders self enforcing and broadening the NLRB's injunctive relief provisions to include unfair labor practice cases. Whether or not either of those changes would in fact produce less, rather than more, delay in resolving unfair labor practice cases is certainly debatable; it is not debatable that such changes would substantially tilt the balance between employer and employee rights under the National Labor Relations Act. Title III of the Committee bill does not try to, nor does it, tilt the balance between employer and employee rights under the NLRA. It simply seeks speedy, and therefore more just, resolution of disputes in unfair labor practice cases involving allegations of unlawful discharge.

In short, Title III is an appropriate response to years of frustration on the part of employees and employers about the length of time and delay in having unfair labor practice charges resolved. Employees, employers, and taxpayers who fund the agency deserve and need more timely resolution of these cases.

TITLE IV—ATTORNEYS' FEES

Small businesses and labor organizations facing an action brought against them by the National Labor Relations Board are at a huge disadvantage. The NLRB has an army of lawyers well-versed in labor law, while the small company—or labor organization—often does not have the resources to adequately defend itself. Small entities often are unable to fight a questionable case to its conclusion based on the merits because of a lack of resources, and end up having to settle the case with the Board because it is the only viable option.

In Fiscal Year 1996, for example, the Board received nearly 33,000 unfair labor practice charges, and 2,558 charges resulted in a complaint being issued by the Board's general counsel. Of these complaints, 2,204 were settled at some point post-complaint.[52] In Fiscal Year 1995, the NLRB received 34,004 unfair labor practice charges, issued 3,034 complaints, and settled 2,295 cases post-complaint.[53]

As labor attorney Jay P. Krupin aptly summarized the situation when testifying before the subcommittee:[54]

> When unions file unfair labor practice charges, the Board in reality becomes the advocate for the union. The union benefits from the Board's resources and staff, and generally does not have to expend additional significant funds to process their claims. Unfortunately, smaller employers have no such aid. Moreover, unions know this. Therefore, unions file goading charges, exaggerating claims to such a degree that the Board must investigate and cause employers to defend themselves. Unions file multiple charges,

[52] Figures provided by the NLRB to the Committee in chart form—a summary of figures available in the NLRB's annual reports.

[53] Id.

[54] February 5, 1998, written testimony of Jay P. Krupin, partner, Krupin Greenbaum & O'Brien, LLC, before the Employer-Employee Relations Subcommittee on the House Education and the Workforce Committee, pp. 8–9. (Emphasis added.)

> hoping to convince the Board that some impropriety must have occurred if so many claims are alleged. Unions file charges specifically and artfully based upon credibility determinations, requiring the Board to issue a complaint and seek a hearing because the credibility of witnesses becomes crucial in the case. *As a result, even if an employer is correct on the merits, the actions of the Board on behalf of unions as the charging party virtually beat an employer into submission. Such actions back small employers against the wall into settling matters where no wrongdoing occurred. Some employers stand on the verge of bankruptcy to defend themselves. Recently, the NLRB has become increasingly hostile to small employers with the stress of limited resources and internal time limits which may not be practical. The small employer is trapped.* This is not the purpose of the National Labor Relations Act. It is not the mandate of the National Labor Relations Board. Indeed, the Board must look more closely at Labor's claims and must take greater responsibility before issuing complaints and holding hearings. To ensure that such abuses do not continue, we fully support [Title IV].

Under current law, small businesses and unions who have prevailed against the NLRB may use the Equal Access to Justice Act (EAJA) to attempt to recover the attorney's fees and expenses they have incurred in defending the action they have won.[55] The EAJA-passed in 1980 to provide small employers an effective means to fight unwarranted intrusions by federal agencies—is available to employers having not more than 500 employees and a net worth of not more than $7 million. Unfortunately, the EAJA is not often utilized against the NLRB and has proven ineffective.

Under the EAJA, a prevailing party[56] will not get its fees if the losing agency can show its position was "substantially justified." The NLRB general counsel has easily met the "substantially justified" burden of proof because courts have interpreted the burden to actually be one of "reasonable basis in law and fact."[57] Despite Congress' effort in 1985 to clarify (in committee report language) that "substantially justified" places a burden on the general coun-

[55] § 5 U.S.C. 504 et seq.; 28 U.S.C. 2412 et seq. The EAJA provides that an agency, in any adversary adjudication, or a court, in any civil action (except tort actions and tax cases, but including judicial review of agency actions), shall award "to a prevailing party other than the United States," fees and other litigation expenses unless the agency or court can demonstrate that its position was "substantially justified" or that "special circumstances make an award unjust." 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d). Viewed by Congress as a small business relief measure and as a regulatory reform bill, the EAJA was passed in 1980 on a three-year trial basis, expired in 1984, and was reenacted on a permanent basis is 1985, retroactive to 1984. Congress intended that litigants of modest resources would be encouraged to defend themselves against unjustified government action.

[56] In addition to falling within the EAJA's net worth and employee limitations, an applicant must "prevail" against the Board in order to be eligible to recover fees and expenses. A party must be "a respondent in an adversary adjudication who prevails in that proceeding, or in a significant and discrete substantive portion of the proceeding." 29 CFR Section 102.142(b). The Board must actually issue a complaint in order to create the possibility of any potential EAJA claim. 29 CFR Section 102.143(a) ("the term adversary adjudication as use in this subpart, means unfair labor practice proceedings pending before the Board on complaint").

[57] *Pierce* v. *Underwood,* 487 U.S. 552 (1988). In *Pierce,* the Supreme Court held that a "more than mere reasonableness" test would be "out of accord with prior usage" and "unadministerable." "Between the test of reasonableness," the Court wrote, "and a test such as 'clearly and convincingly justified' . . . there is simply no accepted stopping-place, no ledge that can hold the anchor for steady and consistent judicial behavior." 487 U.S. at 568.

sel greater than "reasonable basis," [58] current law follows the 1988 Supreme Court ruling that the burden is in fact the lower "reasonable basis" standard.

Given the NLRB's low burden, and since an EAJA claim itself can be as costly as the underlying action, not many EAJA applications are being filed with the Board. A GAO report prepared for the Committee and released in February 1998 [59] showed that the number of EAJA applications received by the NLRB reached a high of 51 in 1984 and a low of six in 1994.[60] As Table III.1 and Table III.2 below show, the number of EAJA applications for both Board and Circuit Court of Appeals decisions, and applications granted, has fallen drastically:[61]

TABLE III.1—BOARD DECISIONS ON EAJA APPLICATIONS AT NLRB, FISCAL YEARS 1982–97

Fiscal year	Number of applications		Amount of fees and expenses awarded
	Decided	Granted	
1982	17	0	0
1983	37	0	[1] $23,941
1984	35	3	39,226
1985	26	2	69,153
1986	31	6	126,620
1987	7	1	126,766
1988	8	5	106,042
1989	24	3	40,534
1990	12	1	14,415
1991	5	0	[1] 28,400
1992	9	3	60,822
1993	4	0	0
1994	2	2	31,900
1995	7	3	36,553
1996	8	1	11,319
1997	2	2	14,345
Total	234	32	730,036

[1] Although NLRB records showed these as fees and expenses awarded, NLRB offficials explained that they were probably not amounts awarded by NLRB but (1) may have represented settlements or cases decided by ALJs and not appealed to NLRB but became orders of NLRB or (2) were applications that were granted in one fiscal year but paid in another.

TABLE III.2—CIRCUIT COURT OF APPEALS DECISIONS OF NLRB EAJA APPLICATIONS, FISCAL YEARS 1982–97

Fiscal year	Number of applications		Amount of fees and expenses awarded
	Decided	Granted	
1982	8	0	0
1983	8	1	$16,490
1984	16	0	0
1985	12	1	13,264
1986	9	3	43,652
1987	7	1	25,000
1988	5	2	70,952
1989	6	2	43,957
1990	6	1	150,000
1991	3	2	32,532

[58] H. Rept. 99–120, 99th Cong., 1st Sess. 9–10 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 138.
[59] "Equal Access to Justice Act: Its Use in Selected Agencies," B–278335, GAO/HEHS–98–58R (January 14, 1998).
[60] Id., at pp. 19–20.
[61] Ibid.

TABLE III.2—CIRCUIT COURT OF APPEALS DECISIONS OF NLRB EAJA APPLICATIONS, FISCAL YEARS 1982–97

Fiscal year	Number of applications		Amount of fees and expenses awarded
	Decided	Granted	
1992	5	4	107,428
1993	4	3	100,423
1994	4	2	35,500
1995	0	0	0
1996	8	0	0
1997	6	3	57,585
Total	111	24	696,783

Having decided 146 EAJA applications—and granting 11—during fiscal years 1982 to 1986, the Board decided only 23—granting 8—during fiscal years 1993 to 1997.[62] NLRB EAJA applications have similarly fallen off with respect to circuit court of appeals decisions of NLRB EAJA applications. In fiscal years 1982 to 1986 there were 5 awards out of 56 decisions, while from fiscal years 1993 to 1997, there were 8 awards granted out of only 22 decisions.[63]

It is the Committee's view that despite the EAJA, many small employers are intimidated by the labyrinth of rules, procedures, and politics involved in defending themselves when the NLRB brings a complaint, and believe it is easier—and far less expensive—to give up the fight. While the NLRB understandably would argue that the lack of successful EAJA claims is due to it carefully issuing only worthy complaints—ones it is "substantially justified" in bringing—small employers and unions prevailing against the Board, however, recognize the long odds of winning, and high expense of undertaking, additional litigation to attempt to secure an award under the EAJA.[64]

As pointed out by the U.S. Chamber of Commerce, "A prevailing small business must file a petition—another costly legal action—for reimbursement of its legal expenses under EAJA and then face the prospect that the Board will usually prevail in its claim of substantial justification. Accordingly, most prevailing small businesses do not even file for EAJA reimbursement. (An average of only 10 applications were received by the Board each year during the period 1987 to 1996—a telling statistic)."[65]

Since it is clear the EAJA is underutilized at best, and at worst simply not working, Title IV of the Fairness for Small Business and Employees Act of 1998 imposes a flat rule: If you are a small employer or small labor organization, and you prevail against the NLRB, then you will get your attorney's fees and expenses from the

[62] Id., at p. 19.

[63] Id., at p. 20.

[64] See, Lewis, Robert, "NLRB Policy Under the Equal Access to Justice Act," Nat. L.J., April 9, 1984 ("[EAJA] applications are opposed as a matter of course on a variety of technical grounds, quite apart from the main issue of substantial justification or special circumstances. As a result, the respondent who wins the underlying unfair labor practice case may find that the expense involved in litigating his fee application exceeds the cost of the initial litigation, with no assurance of success").

[65] February 5, 1998, written testimony of Peter C. Rousos, on behalf of the U.S. Chamber of Commerce, before the Employer-Employee Relations Subcommittee of the House Education and the Workforce Committee, p. 7.

Board.[66] Title IV would greatly assist small companies like Bay Electric Company, of Cape Elizabeth, Maine, a family-owned electrical contracting company employing 17 people. Founder Don O. Mailman, in urging the subcommittee to move forward with the legislation, described how his company has spent more than $100,000 to defend itself against 11 charges that were ultimately dismissed, and that he personally knows of several small contractors that have pled guilty to charges "rather than face what we went through to prove their innocence."[67]

Title IV of the FSBEA adds a new Section 20 to the National Labor Relations Act. Section 20(a) states that an employer or labor organization which has not more than 100 employees and a net worth of not more than $1.4 million and is a "prevailing party" against the Board in administrative proceedings "shall be" awarded fees as a prevailing party under the EAJA "without regard to whether the position of the Board was substantially justified or special circumstances make an award unjust." It is essentially an "NLRB-loser pays" rule applying to the Board in its actions against small employers or labor organizations.[68]

Title IV awards fees and expenses "in accordance with the provisions" of the EAJA and would thus require a party to file a fee application pursuant to the Board's existing EAJA regulations, but the prevailing party would not be precluded from receiving an award by the NLRB general counsel showing the Board was "substantially justified" in bringing the case or that "special circumstances make an award unjust." If the Board loses, the Board pays the winner's fees and expenses.

Section 20(b) of Title IV applies the same rule regarding the awarding of fees and expenses to a small business or labor organization engaged in a civil court action with the NLRB. This covers situations in which the party wins a case against the NLRB in civil court, including a proceeding for judicial review of Board action. Section 504(c)(2) of the EAJA allows a party to appeal a fee determination within 30 days to a United States court having jurisdiction. The new NLRA Section 20(b) of Title IV of the FSBEA makes clear that fees and expenses incurred appealing an actual fee determination under Section 20(a) would also be awarded to a prevailing party without regard to the "substantial justification" burden of proof.

Title IV levels the playing field for small employers against the Board. Title IV will cause the NLRB to more carefully evaluate the

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[66] For qualifying prevailing employers, i.e., up to 100 employees and a net worth of not more than $1.4 million, it is the Committee's intent that the award shall be paid by the NLRB out of its appropriated funds. The attorney's fee cap under the EAJA was raised from $75 per hour to $125 per hour by Public Law 104–121, Sections 231—233, signed into law March 29, 1996.

[67] Hearing on H.R. 758, the Truth in Employment Act of 1996, before the Subcommittee on Employer-Employee Relations, 105th Cong., 1st Sess., at 99 (October 9, 1997) (Serial No. 105–52).

[68] Contrary to assertions of some Democrats at the February 5, 1998, Employer-Employee Relations Subcommittee hearing on this legislation that the "loser pays" concept would be a novel concept since it flies in the face of our judicial system's "American Rule," which holds that each side pays its own legal expenses, many "loser pays" concepts are in present law—Title VII, the Age Discrimination in Employment Act, and the Equal Pay Act, for example, all provide for attorney's fees to prevailing parties. As noted by the GAO, "The Congressional Research Service identified about 180 fee-shifting statutes other than EAJA as of December 1996." GAO/HEHS–98–58R, *supra* note 59 at p. 25. Furthermore, the Black's Law Dictionary definition of the "American Rule" is that "attorney fees are not awardable to the winning party *unless statutorily or contractually authorized.*" (Emphasis added.)

merits of a case before bringing a complaint against a small business or labor organization, and offers the small entity the incentive to fight a meritless case brought against it and see the case through to full consideration. Title IV of the FSBEA applies to employers—businesses and unions—which have not more than 100 employees and a net worth of not more than $1.4 million. These limits are a mere 20 percent of the current 500 employee/$7 million net worth eligibility limits for employers under the EAJA. Title IV adopts the regulations and fee application procedures promulgated by the NLRB pursuant to the EAJA, except that the Board shall award fees and expenses to qualified applicants without regard to whether the position of the Board was substantially justified or special circumstances make an award unjust.[69]

As stated above, an employer or labor organization with a net worth of more than $7 million is not eligible for an EAJA award. Under Title IV of the FSBEA, an employer, or labor organization, in addition to the eligibility requirement of having no more than 100 employees, is also subject at the same time to a net worth limit of $1.4 million.

The EAJA and the Board's regulations do not define the term "net worth," and the EAJA's legislative history provides very little as to congressional intent. Congressional committee reports simply define "net worth" as total assets less total liabilities.[70] Under the NLRB's EAJA regulations, the applicant must include with its application a statement attesting to its net worth and written verification under oath or under penalty or perjury that the information provided in the application is true.[71] In addition, the applicant must provide "a detailed exhibit" showing the net worth of the applicant and any affiliates "in any form convenient to the applicant that provides full disclosure of * * * assets and liabilities and is sufficient to determine whether the applicant qualifies under the

[69] The Board's EAJA regulations, 29 CFR Sections102.143–102.155, define "employees" as "all persons who regularly perform services for remuneration for the applicant under the applicant's direction and control. Part-time employees shall be included on a proportional basis." 29 CFR Part 102.143(f). See Also Model Rules for Implementation of the Equal Access to Justice Act in Agency Proceedings, 1 CFR Section 315.104(e). By coupling net worth with an employee-number eligibility standard, Congress viewed the size of an employer's workforce as a rough measure of an entity's available resources, but did not offer particular distinctions among employers based on status of employees or total hours worked.

With respect to part-time employees, it is the Committee's intent that the employee eligibility standard be a basic pro-rate determination along the lines of the federal government's "full-time-equivalent" (FTE) classification. For example, if the payroll on the date of the complaint has 10 full-time and 10 part-time employees, then you have 15 employees for purposes of Title IV of the FSBEA. See Sisk, Gregory C., "The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)", 55 La. L. Rev., 217, 305 (Nov. 1994) ("The full-time equivalent approach best conforms with the purpose of * * * excluding large employers from eligibility based on the likely assumption that an entity able to maintain a large payroll has sufficient resources to withstand unreasonable government conduct"). As under EAJA, it would be the prevailing party's burden to assert "the number, category, and work location of employees of the applicant and its affiliates." 29 CFR Part 102.147(a). Similarly, as the NLRB's regulations state, the determination of number of employees "shall be determined as of the date of the complaint in an unfair labor practice proceeding or the date of the notice of hearing in a backpay proceeding." 29 CFR Part 102.143(d). The above method of calculating part-time employees for purposes of Title IV is intended to put to rest what a NLRB general counsel memorandum issued soon after the EAJA was enacted stated was still undetermined: "[T]here is a question of how to count part-time workers on a proportional basis. Does one compute the number of hours worked by a part-time employee on the date the complaint issued, during the week in which complaint issued, during the payroll period in which complaint issued, or during the year[?]" Gen. Couns. Mem. 83–11 (April 7, 1983), "The Equal Access to Justice Act—The First Year", reprinted in 1983 LAB. REL. Y.B. (BNA) 222.

[70] H. Rept. 96–1418, p. 15; S. Rept. 96–253, p. 17.

[71] 29 CFR Part 102.147(b) and 102.147(e).

standards of this part."[72] Thus, under current law, the applicant must make the assertion of net worth in its fee application and it is up to the general counsel, or administrative law judge, to whom the application is submitted, to object.

The only guidance provided by the EAJA legislative history regarding the proper manner in which to determine net worth concerns valuation of assets: "[I]n determining the value of assets, the cost of acquisition rather than fair market value should be used."[73] Some courts, however, have differed with the Board by allowing accumulated depreciation to be deducted in calculating net worth, and it is the Committee's intention that for purposes of calculating net worth, the adoption of generally accepted accounting practices, as illustrated by the reasoning of these courts, should be followed.[74]

With regard to Title IV specifically discounting consideration of "special circumstances" along with "substantial justification," it was alleged by one witness at the February 5, 1998, subcommittee hearing that the legislation "would reward those small businesses (and unions) who play cat-and-mouse with the Office of the General Counsel" by frustrating the NLRB's investigation with such tactics as, for example, "refusing to allow witnesses to be interviewed, withholding documents and substituting lawyers' submissions for hard evidence."[75] However, the Committee's intent in explicitly discounting "special circumstances" as a consideration in denying a fee award to a prevailing party is not to allow entities with "unclean hands" to reap an undeserved award, rather, the intent is to prevent the Board from advancing "novel" theories which it could argue justifies denying a small business or union from receiving a fee award,[76] and make inapplicable to entities qualifying under Title IV the line of EAJA cases allowing the Board to deny awards based on the agency pushing a novel theory of law. It is the Committee's view that the NLRB should not be using small entities of limited resources as guinea pigs to advance new legal theories. Indeed, if the Board wished to advance some novel theory of law, to "push the envelope," then let it at least do so against those who are larger than 100 employees and have a net worth of more than $1.4 million.

[72] 29 CFR Part 102.147(f).

[73] H. Rept. 96–1418, p. 15.

[74] See, *Continental Web Press* v. *NLRB,* 767 F.2d 321 (7th Cir. 1985) (holding depreciation properly subtracted when computing "net worth" of company seeking attorney's fees under the EAJA, since legislative history [regarding acquisition cost] "means only that the net worth figure must be derived from company's books rather than from appraisal * * * there is no indication that Congress meant by 'cost of acquisition' undepreciated cost of acquisition" and subtracting accumulated depreciation from cost of acquisition is generally accepted accounting practice); See also *Am Pac. Pipe Co., Inc.* v. *NLRB,* 788 F.2d 586 (9th Cir. 1986) (pointing to "brief sketch of legislative history" and holding that "Congress would not have wanted us to create a whole new set of accounting principles just for use in cases under the [EAJA]").

[75] February 5, 1998, written testimony of Richard Griffin, general counsel, International Union of Operating Engineers, before the Employer-Employee Relations Subcommittee of the House Committee on Education and the Workforce, p. 8.

[76] See, *Teamsters Local 741,* 321 NLRB No. 125 (1996) ("the general counsel may carry its burden of proving that its position was substantially justified by showing its position advanced a novel but credible extension or interpretation of the law"); *Lion Uniform,* 285 NLRB 249 (1987) (recognizing that "the special circumstances defense available to the agencies is a safety valve' designed to protect the government from EAJA award where unusual circumstances dictate that the government is advancing in good faith a credible, though novel, rule of law,'" citing, H. Rept. 96–1418 at 14 (1980).

As the National Grocers Association pointed out, allowing small entities to recoup their expenses when they prevail against the Board "is particularly relevant and timely today, as more and more small businesses are being forced to defend against test cases' and novel theories that seek to change NLRB precedent in favor of organized labor."[77]

For circumstances in which the business or union has acted with "unclean hands," i.e., has been uncooperative or unreasonably delayed the Board's investigation, the Committee intends that the Board's existing EAJA regulations would cover situations involving such equities: "An award will be reduced or denied if the applicant has unduly or unreasonably protracted the adversary adjudication or if special circumstances make the award sought unjust."[78]

Title IV says to the NLRB that if it brings a case against a little guy it had better make sure the case is a winner, because if the Board loses, if it puts the small business or union through the time, expense and hardship of an action only to have the small entity come out a winner in the end, then the Board itself will have to reimburse the employer for its attorney's fees and expenses. As Sen. Ted Kennedy, D-MA, stated during floor debate on the EAJA, which the Committee views as directly germane to Title IV and the NLRB, "We can no longer tolerate a legal system under which unreasonable government action affecting small businesses [and] other organizations * * * goes unchallenged because the victims are deterred by the legal expense involved."[79] Also, as Sen. Wendell Ford, D-KY stated, "If the agencies choose their cases carefully they will be completely unaffected by this legislation."[80] While these two Senators supported the EAJA, which now applies to business and labor organizations having up to 500 employees and a net worth of no more than $7 million, the Committee emphasizes that Title IV seeks protection for the very small—those with no more than 100 employees and a net worth of no more than $1.4 million.

CONCLUSION

H.R. 3246 is a targeted bill that seeks to remedy in a narrow fashion four specific problems with the National Labor Relations Board's enforcement of the National Labor Relations Act. Title I simply says to employers that they will not violate the NLRA if they do not hire someone who is not a "bona fide" applicant. While it does nothing to impinge upon the rights of those who are on the job to do a good job, Title I gives employers a certain level of comfort that an applicant is at least half motivated to be a loyal, hardworking employee.

Title II simply codifies the Board's longstanding practice of letting an employer present its side of the case in disputes concerning single location bargaining units. It ensures that the Board will not again try to push its "ill-conceived," mechanistic proposed rule

[77] Hearing on Review of the National Labor Relations Board, before the Subcommittee on Employer-Employee Relations, 105th Cong. 1st Sess., at 219 (September 23, 1997) (Serial No. 105–64).
[78] 29 CFR Part 102.144(b).
[79] July 31, 1979, debate on the EAJA, 125 Cong. Rec. at 21444.
[80] Id., at 21439.

which would ignore many factors germane to whether a certain bargaining unit is appropriate.

Title III offers employees whose lives are hanging in the balance some assurance that the NLRB will render a decision within 365 days on their unfair labor practice charge. Congress did not intend that the Board endlessly drag its feet on enforcing the Act, and Title III tells the Board it must work more quickly to resolve cases in which a discharged employee may have been wronged under the NLRA.

Finally, Title IV ensures that small businesses and small unions will have the incentive to fight meritless cases that the Board brings against them. If the Board is going to bring its vast resources and expertise to bear upon an entity with meager resources, then the Board should pay the prevailing party's attorney's fees and expense if the agency loses the case.

SECTION-BY-SECTION ANALYSIS

Section 1

Contains the Short Title, "Fairness for Small Business and Employees Act of 1998."

TITLE I

Section 101

Establishes the findings of the Committee related to the necessity of a healthy atmosphere of trust and civility in labor-management relations, the prevalence of "salting" tactics, and an employer's right to expect job applicants to be primarily interested in working for that employer.

Section 102

Provides that the purpose of Title I is to preserve the balance of rights under the NLRA and to alleviate pressure on employers to hire individuals who seek or gain employment to disrupt the workplace or inflict economic harm to put the employer out of business.

Section 103

Amends the National Labor Relations Act to provide that nothing in the NLRA shall require an employer to hire someone who is not a "bona fide" employee applicant, in that such a person seeks or sought employment with the primary purpose of furthering other employment or agency status. Also provides that this section does not affect any rights and responsibilities of any employee so long as they are or were a "bona fide" employee applicant.

TITLE II

Section 201

Establishes the findings of the Committee related to the necessity of fact-specific analysis and case-by-case adjudication to determine bargaining units, the longstanding practice of the NLRB in holding hearings for such unit determinations, and the imprecision and upsetting of labor relations stability resulting from any blanket rule which limits factors considered material to such single location bargaining unit determinations.

Section 202

Provides that the purpose of Title II is to ensure that the NLRB conducts a hearing process and specific analysis of all relevant facts and circumstances of a particular case involving a single location bargaining unit determination.

Section 203

Amends the National Labor Relations Act to require that when a petition for an election requests the NLRB to certify a unit including employees employed at one or more facilities of a multi-facility employer, in the absence of an agreement by the parties regarding the appropriateness of the bargaining unit at issue, that in making its determination the Board shall provide for a hearing to consider functional integration, centralized control, common skills, functions and working conditions, permanent and temporary employee interchange, geographical separation, local autonomy, the number of employees, bargaining history, if any, and such other factors as the Board considers appropriate.

TITLE III

Section 301

Establishes the findings of the Committee related to the right of an employee to be free from discrimination with regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization, the chilling effect on Section 7 rights of discharges, the lengthy delays of the NLRB in rendering decisions on such discriminatory unfair labor practice cases, the need for the NLRB to resolve such cases in a timely manner, and the benefits that timely disposition to employees and to employers due to reducing the costs of litigation and backpay awards.

Section 302

Provides that the purpose of Title III is to ensure that the NLRB resolves in a timely manner all unfair labor practice complaints alleging that an employee has been unlawfully discharged to encourage or discourage membership in a labor organization.

Section 303

Amends the National Labor Relations Act to require that the NLRB resolve no later than 365 days after the filing of the charge any unfair labor practice charge alleging unlawful discharge. Also provides an exemption from the one-year time limit for cases of "extreme complexity," and requires the Board to report annually to the House Committee on Education and the Workforce and to the Senate Committee on Labor and Human Resources on any such cases pending for more than one year, including an explanation of the factors contributing to such a delay and recommendations for prompt resolution of such cases.

Section 304

Authorizes the Board to issue any necessary regulations to carry out the purposes of Title III.

TITLE IV

Section 401

Establishes the findings of the Committee related to the disadvantage small businesses and labor organizations are at in terms of expertise and resources when facing actions brought against them by the NLRB, the ineffectiveness and underutilization of the Equal Access to Justice Act at the NLRB, and the necessity of a different standard that awards fees and costs to certain small entities prevailing against the Board. Also provides that the purpose of Title IV is to ensure that certain small businesses and small labor organizations will not be deterred from seeking review of, or defending against, Board actions because of the expense involved, to reduce the disparity in resources and expertise between certain small entities and the NLRB, and to make the Board more accountable for its enforcement actions.

Section 402

Amends the National Labor Relations Act to require the Board to pay the attorney's fees and costs of parties who have not more than 100 employees and a net worth of not more than $1.4 million who prevail against the Board in both administrative proceedings or in court proceedings. Also makes clear that such fees and costs shall be awarded to such an entity as a prevailing party under 5 U.S.C. § 504 and 28 U.S.C. § 2412(d) of the Equal Access to Justice Act without regard to whether the position of the Board or the United States was substantially justified or special circumstances make an award unjust.

Section 403

Provides that Section 402 applies to agency proceedings and civil actions commenced on or after the date of the enactment of this Act.

CONSTITUTIONAL AUTHORITY

Each of the four titles of H.R. 3246, the Fairness for Small Business and Employees Act, amends the National Labor Relations Act. The NLRA has been determined, by the Supreme Court, to be within Congress' Constitutional authority.[81] The FSBEA amends the NLRA to provide additional protections for small businesses, small labor organizations, and employees, and is therefore similarly within the scope of Congressional powers under Article 1, Section 8, Clause 3 of the Constitution of the United States.

EXPLANATION OF AMENDMENTS

The bill was reported without amendment.

[81] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937).

Application of Law to the Legislative Branch

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. This bill amends the National Labor Relations Act by: making it clear that employers are not required to hire someone who is not a bona fide applicant; codifying factors used in bargaining unit determinations; requiring timely resolution of employee discharge cases; and, requiring the NLRB to pay the legal costs of small business when the NLRB has brought a meritless case against the small business. The bill does not prevent legislative branch employees from receiving the benefits of this legislation.

Unfunded Mandate Statement

Section 423 of the Congressional Budget and Impoundment Control Act requires a statement of whether the provisions of the reported bill include unfunded mandates. This bill amends the National Labor Relations Act by: making it clear that employers are not required to hire someone who is not a bona fide applicant; codifying factors used in bargaining unit determinations; requiring timely resolution of employee discharge cases; and, requiring the NLRB to pay the legal costs of small business when the NLRB has brought a meritless case against the small business. As such, the bill does not contain any unfunded mandates.

Statement of Oversight Findings and Recommendations of the Committee

In compliance with clause 2(l)(3)(A) of rule XI and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

Statement of Oversight Findings of the Committee on Government Reform and Oversight

With respect to the requirement of clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform and Oversight on the subject of H.R. 3246.

Committee Estimate

Clause 7 of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 3246. Clause 7(d) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act. The Committee therefore has not prepared a comprehensive estimate; but the Committee has following comments on the CBO estimate.

It is the Committee's view that CBO's estimate that Title IV of H.R. 3246, addressing attorney's fees, will cost about $1 million a year, is too high, extremely speculative and based upon assumptions that appear to be pulled out of thin air. The Committee notes that in arriving at its estimate of Title IV, CBO acknowledges that the NLRB itself does not keep net worth figures of those against whom it brings cases. Therefore, in estimating those prevailing parties meeting both Title IV eligibility limitations of up to 100 employees and a net worth of up to $1.4 million, CBO has simply imported some general data from Dun & Bradstreet estimates and apparently assumed that every entity with no more than 100 employees also has a net worth of no more than $1.4 million.

Similarly, in light of the fact that fee applications filed under the Equal Access to Justice Act (EAJA) have cost the Board a total of roughly $1.42 million since 1982, and the fact that CBO was off on its original scoring of the EAJA by roughly 10,000 percent (100 times), it is the Committee's view that an annual cost of $1 million for Title IV is too high.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 2(l)(3)(B) of rule XI of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 2(l)(3)(C) of rule XI of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 3246 from the Director of the Congressional Budget Act:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 11, 1998.

Hon. WILLIAM F. GOODLING,
Chairman, Committee on Education and the Workforce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3246, the Fairness for Small Business and Employees Act of 1998.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christina Hawley Sadoti.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

H.R. 3246—Fairness for Small Business and Employees Act of 1988

Summary: H.R. 3246 would increase spending by the National Labor Relations Board (NLRB) by allowing private parties with 100 or fewer employees and a net worth of $1.4 million or less to be awarded attorney's fees and expenses if they do prevail against the NLRB in administrative or judicial proceedings. The additional spending, about $1 million in 1999, and $5 million over the 1999–2003 period, would be subject to the annual appropriations process.

H.R. 3246 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA).

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 3246 is shown in the following table.

The costs of this legislation fall within budget function 500 (education, training, employment, and social services).

[By fiscal year, in millions of dollars]

	1998	1999	2000	2001	2002	2003
SPENDING SUBJECT TO APPROPRIATION						
Spending by the NLRB under current law:						
Budget authority	175	184	191	199	207	215
Estimated outlays	175	184	191	198	206	215
With Adjustments for Inflation						
Proposed changes:						
Estimated authorization levels	....	1	1	1	1	1
Estimated outlays	....	1	1	1	1	1
Spending under H.R. 3246:						
Estimated authorization levels	175	185	192	200	208	216
Estimated outlays	175	185	192	199	207	216
Without Adjustments for Inflation						
Spending by the NLRB under current law:						
Budget authority	175	175	175	175	175	175
Estimated outlays	175	175	175	175	175	175
Proposed changes:						
Estimated authorization levels	....	1	1	1	1	1
Estimated outlays	....	1	1	1	1	1
Spending under H.R. 3246:						
Estimated authorization levels	175	176	176	176	176	176
Estimated outlays	175	176	176	176	176	176

Basis of estimate

Spending subject to appropriation

H.R. 3246 would amend the National Labor Relations Act (NLRA) in four areas. First, the bill would make it easier for employers to deny employment to applicants who are not "bona fide" employee applicants. This provision would allow employers to refuse to hire union organizers who seek jobs with the intention of organizing workers. Current law prohibits employers from discriminating against prospective employees based on their union membership status. Second, the bill would require the National Labor Relations Board to hold hearings in some cases where employees petition for representation elections. Third, it would set time limits for the NLRB to resolve complaints, and would require the NLRB to report to Congress on cases that are pending for more than one year. Fourth, the bill would allow employers and labor organizations with fewer than 100 employees and less than $1.4 million in net worth to be awarded attorneys fees and expenses if they prevail in an adversary adjudication or a court proceeding.

The only provision with a significant budgetary impact is that allowing certain relatively small firms and labor organizations to recover their legal expenses following favorable rulings. The increase in spending due to this change would probably be small—about $1 million per year, on average. Under the Equal Access to Justice Act (EAJA), the payments of fees and expenses would be made from the agency's discretionary appropriations.

The bill would allow employers and labor organizations that have fewer than 100 employees and a net worth of $1.4 million or less to be awarded attorney's fees and expenses in cases where they prevail against the NLRB, regardless of whether the position of the NLRB was substantially justified. Currently under the EAJA, a prevailing party with fewer than 500 employees and less than $7 million in net worth may recover fees and expenses, but only if the party can prove that the position of the United States was substantially unjustified. In practice, it is very difficult for a prevailing party to prove that the U.S. government did not have substantial justification in bringing a claim forward. Since 1982, 345 parties involved in NLRB cases have filed applications under this provision. Of these applications, only 56 were granted, with total awards of approximately $1.4 million in fees and expenses. This bill would make it easier for very small businesses to recover fees and expenses by not requiring them to prove that the U.S. government was not substantially justified.

About half of the unfair labor practice cases brought by the NLRB involve establishments with less than 100 employees. Although the NLRB does not keep data on the net worth of the business against which it brings cases, the business information services firm of Dun & Bradstreet estimates that the distribution of net worth is roughly similar to the distribution of the number of employees per establishment. For purposes of this estimate, CBO assumes that about half of the cases lost by the NLRB—or about 40 per year—involve establishments with fewer than 100 employees and a net worth of less than $1.4 million. Assuming an average cost per case of $25,000, enactment of H.R. 3246 would increase spending by the NLRB by about $1 million per year.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: H.R. 3246 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal cost: Christina Hawley Sadoti; Impact on State, local, and tribal governments: Marc Nicole; Impact on the private sector; Nabeel Alsalam.

Estimate approved by: Paul N. Van de Water, Assistant Director for Budget Analysis.

ROLLCALL VOTES

Rollcall: 1.
Bill: H.R. 3246.
Date: March 11, 1998.
Amendment number: 1.
Defeated: 15–19.
Sponsor/Amendment: Mr. Payne/amendment to strike title I.

Member	Aye	No	Present	Not voting
Mr. Goodling, Chairman	....	X	....	....
Mr. Petri, Vice Chairman	....	X	....	....
Mrs. Roukema	....	....	....	X
Mr. Fawell	....	X	....	....
Mr. Ballenger	....	X	....	....

Member	Aye	No	Present	Not voting
Mr. Barrett	....	X	....	....
Mr. Hoekstra	....	....	....	X
Mr. McKeon	....	X	....	....
Mr. Castle	....	X	....	....
Mr. Johnson	....	X	....	....
Mr. Talent	....	X	....	....
Mr. Greenwood	....	X	....	....
Mr. Knollenberg	....	....	....	X
Mr. Riggs	....	....	....	X
Mr. Graham	....	X	....	....
Mr. Souder	....	X	....	....
Mr. McIntosh	....	X	....	....
Mr. Norwood	....	X	....	....
Mr. Paul	....	X	....	....
Mr. Schaffer	....	....	....	X
Mr. Peterson	....	X	....	....
Mr. Upton	....	X	....	....
Mr. Deal	....	X	....	....
Mr. Hilleary	....	X	....	....
Mr. Scarborough	....	....	....	X
Mr. Clay	X	....	....	....
Mr. Miller	....	....	....	X
Mr. Kildee	X	....	....	....
Mr. Martinez	X	....	....	....
Mr. Owens	X	....	....	....
Mr. Payne	....	....	....	X
Mrs. Mink	X	....	....	....
Mr. Andrews	X	....	....	....
Mr. Roemer	X	....	....	....
Mr. Scott	X	....	....	....
Ms. Woolsey	X	....	....	....
Mr. Romero-Barcelo	X	....	....	....
Mr. Fattah	X	....	....	....
Mr. Hinojosa	....	....	....	X
Mrs. McCarthy	X	....	....	....
Mr. Tierney	X	....	....	....
Mr. Kind	X	....	....	....
Ms. Sanchez	X	....	....	....
Mr. Ford	....	....	....	X
Mr. Kucinich	....	....	....	X
Totals	15	19	....	11

Rollcall: 2.
Bill: H.R. 3246.
Date: March 11, 1998.
Amendment number: 2.
Defeated: 17–20.
Sponsor/Amendment: Mr. Clay/amendment to strike title II.

Member	Aye	No	Present	Not voting
Mr. Goodling, Chairman	....	X	....	....
Mr. Petri, Vice Chairman	....	X	....	....
Mrs. Roukema	....	....	....	X
Mr. Fawell	....	X	....	....
Mr. Ballenger	....	X	....	....
Mr. Barrett	....	X	....	....
Mr. Hoekstra	....	X	....	....
Mr. McKeon	....	X	....	....
Mr. Castle	....	X	....	....
Mr. Johnson	....	X	....	....
Mr. Talent	....	X	....	....

Member	Aye	No	Present	Not voting
Mr. Greenwood	....	X	....	....
Mr. Knollenberg	....	X	....	....
Mr. Riggs	....	....	....	X
Mr. Graham	....	....	....	X
Mr. Souder	....	X	....	....
Mr. McIntosh	....	X	....	....
Mr. Norwood	....	X	....	....
Mr. Paul	....	X	....	....
Mr. Schaffer	....	....	....	X
Mr. Peterson	....	X	....	....
Mr. Upton	....	X	....	....
Mr. Deal	....	X	....	....
Mr. Hilleary	....	X	....	....
Mr. Scarborough	....	....	....	X
Mr. Clay	X	....	....	....
Mr. Miller	....	....	....	X
Mr. Kildee	X	....	....	....
Mr. Martinez	X	....	....	....
Mr. Owens	X	....	....	....
Mr. Payne	....	....	....	X
Mrs. Mink	X	....	....	....
Mr. Andrews	X	....	....	....
Mr. Roemer	X	....	....	....
Mr. Scott	X	....	....	....
Ms. Woolsey	X	....	....	....
Mr. Romero-Barcelo	X	....	....	....
Mr. Fattah	X	....	....	....
Mr. Hinojosa	X	....	....	....
Mrs. McCarthy	X	....	....	....
Mr. Tierney	X	....	....	....
Mr. Kind	X	....	....	....
Ms. Sanchez	X	....	....	....
Mr. Ford	....	....	....	X
Mr. Kucinich	X	....	....	....
Totals	17	20	....	8

Roll call: 3.
Bill: H.R. 3246.
Date: March 11, 1998.
Amendment number: 4.
Defeated: 18–22.
Sponsor/Amendment: Mr. Scott/amendment to strike title IV.

Member	Aye	No	Present	Not voting
Mr. Goodling, Chairman	....	X	....	....
Mr. Petri, Vice Chairman	....	X	....	....
Mrs. Roukema	....	....	....	X
Mr. Fawell	....	X	....	....
Mr. Ballenger	....	X	....	....
Mr. Barrett	....	X	....	....
Mr. Hoekstra	....	X	....	....
Mr. McKeon	....	X	....	....
Mr. Castle	....	X	....	....
Mr. Johnson	....	X	....	....
Mr. Talent	....	X	....	....
Mr. Greenwood	....	X	....	....
Mr. Knollenberg	....	X	....	....
Mr. Riggs	....	....	....	X
Mr. Graham	....	X	....	....
Mr. Souder	....	X	....	....
Mr. McIntosh	....	X	....	....

Member	Aye	No	Present	Not voting
Mr. Norwood	....	X	....	....
Mr. Paul	....	X	....	....
Mr. Schaffer	....	....	....	X
Mr. Peterson	....	X	....	....
Mr. Upton	....	X	....	....
Mr. Deal	....	X	....	....
Mr. Hilleary	....	X	....	....
Mr. Scarborough	....	X	....	....
Mr. Clay	X	....	....	....
Mr. Miller	....	....	....	X
Mr. Kildee	X	....	....	....
Mr. Martinez	X	....	....	....
Mr. Owens	X	....	....	....
Mr. Payne	X	....	....	....
Mrs. Mink	X	....	....	....
Mr. Andrews	X	....	....	....
Mr. Roemer	X	....	....	....
Mr. Scott	X	....	....	....
Ms. Woolsey	X	....	....	....
Mr. Romero-Barcelo	X	....	....	....
Mr. Fattah	X	....	....	....
Mr. Hinojosa	X	....	....	....
Mrs. McCarthy	X	....	....	....
Mr. Tierney	X	....	....	....
Mr. Kind	X	....	....	....
Ms. Sanchez	X	....	....	....
Mr. Ford	....	....	....	X
Mr. Kucinich	X	....	....	....
Totals	18	22	....	5

Rollcall: 4
Bill: H.R. 3246.
Date: March 11, 1998.
Passed 23–18.
Sponsor/Amendment: Mr. Petri/motion to report the bill to the House with the recommendation that the bill do pass.

Member	Aye	No	Present	Not voting
Mr. Goodling, Chairman	X	....	....	....
Mr. Petri, Vice Chairman	X	....	....	....
Mrs. Roukema	....	....	....	X
Mr. Fawell	X	....	....	....
Mr. Ballenger	X	....	....	....
Mr. Barrett	X	....	....	....
Mr. Hoekstra	X	....	....	....
Mr. McKeon	X	....	....	....
Mr. Castle	X	....	....	....
Mr. Johnson	X	....	....	....
Mr. Talent	X	....	....	....
Mr. Greenwood	X	....	....	....
Mr. Knollenberg	X	....	....	....
Mr. Riggs	....	....	....	X
Mr. Graham	X	....	....	....
Mr. Souder	X	....	....	....
Mr. McIntosh	X	....	....	....
Mr. Norwood	X	....	....	....
Mr. Paul	X	....	....	....
Mr. Schaffer	X	....	....	....
Mr. Peterson	X	....	....	....
Mr. Upton	X	....	....	....
Mr. Hilleary	X	....	....	....

Member	Aye	No	Present	Not voting
Mr. Scarborough	X	....	....	....
Mr. Clay	....	X	....	....
Mr. Miller	....	....	....	X
Mr. Kildee	....	X	....	....
Mr. Martinez	....	X	....	....
Mr. Owens	....	X	....	....
Mr. Payne	....	X	....	....
Mrs. Mink	....	X	....	....
Mr. Andrews	....	X	....	....
Mr. Roemer	....	X	....	....
Mr. Scott	....	X	....	....
Ms. Woolsey	....	X	....	....
Mr. Romero-Barcelo	....	X	....	....
Mr. Fattah	....	X	....	....
Mr. Hinojosa	....	X	....	....
Mrs. McCarthy	....	X	....	....
Mr. Tierney	....	X	....	....
Mr. Kind	....	X	....	....
Ms. Sanchez	....	X	....	....
Mr. Ford	....	....	....	X
Mr. Kucinich	....	X	....	....
Totals	23	18	....	4

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

NATIONAL LABOR RELATIONS ACT

* * * * * * *

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) * * *

* * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Nothing in this subsection shall be construed as requiring an employer to employ any person who is not a bona fide employee applicant, in that such person seeks or has sought employment with the employer with the primary purpose of furthering another employment or agency status: Provided, That this sentence shall not affect the rights and responsibilities under this Act of any employee who is or was a bona fide employee applicant.

* * * * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) * * *

* * * * * * *

(c)(1) * * *

* * * * * * *

(6) If a petition for an election requests the Board to certify a unit which includes the employees employed at one or more facilities of a multi-facility employer, and in the absence of an agreement by the parties (stipulation for certification upon consent election or agreement for consent election) regarding the appropriateness of the bargaining unit at issue for purposes of subsection (b), the Board shall provide for a hearing upon due notice to determine the appropriateness of the bargaining unit. In making its determination, the Board shall consider functional integration, centralized control, common skills, functions and working conditions, permanent and temporary employee interchange, geographical separation, local autonomy, the number of employees, bargaining history, and such other factors as the Board considers appropriate.

* * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) * * *

* * * * * * *

(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (i). *Whenever a complaint is issued as provided in subsection (b) upon a charge that any person has engaged in or is engaging in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8 involving an unlawful discharge, the Board shall state its findings of fact and issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action, including reinstatement of an employee with or without backpay, as will effectuate the policies of this Act, or shall state its findings of fact and issue an order dismissing the said complaint, not later than 365 days after the filing of the unfair labor practice charge with the Board except in cases of extreme complexity. The Board shall submit a report annually to the Committee on Education and the Workforce of the House of Representatives and the Committee on Labor and Human Resources of the Senate regarding any cases pending for more than 1 year, including an explanation of the factors contributing to such a delay and recommendations for prompt resolution of such cases.*

* * * * * * *

AWARDS OF ATTORNEYS' FEES AND COSTS

SEC. 20. (a) ADMINISTRATIVE PROCEEDINGS.—An employer who, or a labor organization that—

(1) is the prevailing party in an adversary adjudication conducted by the Board under this or any other Act, and

(2) had not more than 100 employees and a net worth of not more than $1,400,000 at the time the adversary adjudication was initiated,

shall be awarded fees and other expenses as a prevailing party under section 504 of title 5, United States Code, in accordance with the provisions of that section, but without regard to whether the position of the Board was substantially justified or special circumstances make an award unjust. For purposes of this subsection, the term "adversary adjudication" has the meaning given that term in section 504(b)(1)(C) of title 5, United States Code.

(b) COURT PROCEEDINGS.—An employer who, or a labor organization that—

(1) is the prevailing party in a civil action, including proceedings for judicial review of agency action by the Board, brought by or against the Board, and

(2) had not more than 100 employees and a net worth of not more than $1,400,000 at the time the civil action was filed,

shall be awarded fees and other expenses as a prevailing party under section 2412(d) of title 28, United States Code, in accordance with the provisions of that section, but without regard to whether the position of the United States was substantially justified or special circumstances make an award unjust. Any appeal of a determination of fees pursuant to subsection (a) or this subsection shall be determined without regard to whether the position of the United States was substantially justified or special circumstances make an award unjust.

MINORITY VIEWS

H.R. 3246 STRIKES AT THE VERY HEART OF THE NLRA

Under the guise of "[a]chieving [f]airness for [s]mall [b]usiness and [e]mployees," H.R. 3246 represents a major assault on the National Labor Relations Act (NLRA). Through its four disparate provisions, the entire bill undercuts the fundamental right of workers to choose a collective bargaining representative without employer coercion and prohibits effective use of the National Labor Relations Board's (NLRB) resources to enforce the Act.

Title I, "Truth in Employment," declares that job applicants who "seek employment . . . with the primary purpose of furthering another employment or agency status" fall outside of a newly-created class of "bona fide employee applicant[s]," and gives employers license to refuse to hire them. In so doing, Title I denies employment to those union supporters who seek jobs at non-union worksites, solely because they may exercise their right to engage in collective action.

Title II, "Fair Hearing," requires the Board to apply a confusing, subjective and multifactored test to determine the appropriateness of a single-location bargaining unit whenever it receives an election petition for a unit of employees "at one or more facilities of a multifacility employer," rather than to apply the rational test it has developed over the course of thirty years. Title II thus provides employers who oppose unionization a potent weapon to delay and challenge Board elections, despite the clear will of their employees to choose union representation.

Title III, "Justice on Time," requires the Board to issue findings and an order within 365 days of receiving an unfair labor practice charge alleging an unlawful discharge in violation of Section 8(a)(3) or 8(b)(2) of the Act, "except in cases of extreme complexity." At the same time, Title III fails to provide for the necessary increase in Board resources to make this guarantee anything more than a drain on already overworked agency personnel. In addition, Title III fails to address two critical and related issues. First, the NLRA should provide for immediate reinstatement of an employee discharged for the exercise of protected rights during the period preceding a Board order. Second, the NLRA should make clear that Board orders take effect immediately, to remove the delay now attendant upon judicial review.

Title IV, "Attorneys Fees," seeks to reverse the American Rule with respect to attorneys' fees in a single class of cases, namely, those in which the NLRB does not prevail in administrative or judicial proceedings against an employer or labor organization with not more than 100 employees and a net worth of not more than $1.4 million. Not only has the Majority failed to provide any evidence whatsoever that the Board has abused its statutory authority in issuing and prosecuting complaints, but it has also failed to show why the Equal Access to Justice Act, 5 U.S.C. 504, provides insufficient redress to respondents who prevail in proceedings before the National Labor Relations.

None of the measures contained in this bill are new, and as we discuss below, they have already failed to withstand the scrutiny of the NLRB, the courts, and the Congress. Nonetheless, the Committee, along party lines, has voted to bundle together these disparate proposals, and thereby report out a bill that threatens the right of employees to opt for collective representation free of employer interference, and the statutory responsibility of the Board to enforce that right. As such, H.R. 3246 reverses over 50 years of Congressional policy promoting workplace freedom of association "as an instrument of peace rather than of strife." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34 (1937).

DESPITE ITS TITLE, THIS BILL COVERS THE VAST MAJORITY OF AMERICAN WORKPLACES

Although the Majority captions this bill the "Fairness for Small Business and Employees Act of 1998," the enormous scope of the proposal belies such a misleading title. In fact, three out of four of the bill's provisions contain no limitations whatsoever on the size of the employers to which they apply. Thus, Title I provides universal protection to employers who refuse to hire union supporters; Title II imposes a universal requirement that the Board apply confusing and time-consuming factors in determining the appropriateness of single-facility units; and Title III imposes a 365-day limit on the Board's consideration of every 8(a)(3) or 8(b)(2) complaint. Only Title IV of the bill purports to limit itself to small businesses and labor organizations. Yet, by imposing a ceiling of 100 employees, the bill would cover almost 40 percent of American workers. See U.S. Census Bureau, Statistics of U.S. Businesses, Chart A, internet: http://www.census.gov. In contrast, Congress traditionally defines "small business" for the purpose of establishing coverage under a wide range of employment-related laws by imposing a far smaller ceiling on the size of the workforce. The Age Discrimination in Employment Act, for example, applies to employers who have "twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. 630(b). Similarly, 42 U.S.C. 2111(5), as does Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b). Thus, the Majority's definition of "small business" in H.R. 3246 serves a rhetorical purpose only; in practice, it achieves nearly-universal coverage.

H.R. 3246 UNDERMINES THE NLRA'S PRINCIPLE OF FREE CHOICE

Nor is there anything "fair" to employees about the "Fairness to Small Business and Employees Act." The NLRA recognizes the "fundamental right" of employees "to select representatives of their own choosing for collective bargaining * * * without restraint or coercion by their employer." *Jones & Laughlin*, 301 U.S. at 33. Indeed, "such collective action would be a mockery if representation we were made futile by interference with freedom of choice." Id. at 34. Yet this is precisely what H.R. 3246 would accomplish, by creating a new class of job applicants who are not entitled to a job solely by virtue of their support for collective representation; prohibiting workers from exercising their statutory "initiative * * * [to] select [] an appropriate [bargaining] unit" in any case in which they petition for an election (*American Hospital Ass'n* v. *NLRB*, 499 U.S. 606 (1991)); interfering with the Board's enforcement efforts by imposing strict deadlines on case adjudication without a corresponding increase in resources; and reducing the Board's extremely limited budget by making it pay opponents' costs in administrative and judicial proceedings.

GENUINE LABOR LAW REFORM WOULD STRENGTHEN, NOT GUT, THE NLRA'S GUARANTEE OF FREE CHOICE

The policy behind enactment of the NLRA was to "encourag[e] the practice and procedure of collective bargaining," 29 U.S.C. 151, because "union[s] * * * [are] essential to give laborers opportunity to deal on an equality with their employer." *Jones & Laughlin*, 301 U.S. at 33. This continues to be the case. Unions give workers a voice in how best to get the work done. They help workers get fairly compensated for the contributions they make, as evidenced by the fact that union workers earn an average of 33% more than their nonunion counterparts and are much more likely to have health and pension benefits. Unions raise living standards, secure families' futures, and strengthen communities.

Indeed, unions play a key role in eliminating America's economic disparities. As the unionized share of the workforce has declined, income inequality increased dramatically because unions are the primary mechanism for balancing labor and capital. Only a stronger labor movement will reverse these economic disparities. Unions help close the wage gaps of women and people of color. Unions fight discrimination and actively promote civil and human rights, equal treatment and opportunity, and affirmative action.

Yet the long history of employers' attempts to influence and interfere with their employees' choice in favor of collective representation, aided by the development of the law, demonstrates that many employers have never stopped challenging the basic assumption on which the NLRA rests, that collective representation promotes America's economic and social good. Of the 3,154 complaints issued by the NLRB General Counsel in Fiscal year 1996, 92.6 percent were against employers. "Sixty-First Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 1996" (FY '96 Report) at 5. The majority of these charges alleged illegal discharge or other discrimination against employees: 56 percent of the total charges against employers contained such allegations. Id. at 6. Indeed, Professor Paul Weiler estimates that ten thousand working Americans lose their jobs every year, just for supporting the union.

In countless organizing campaigns, a majority of workers sign authorization cards asserting their desire for union representation but are thwarted by their employer's anti-union campaign. Aided by a $300 million-a-year consulting industry, many employers have learned to circumvent and manipulate the law, stall the organizing process, and harass, threaten, and even fire workers for trying to organize, with minimal penalties at best. Under present law, for example, it is not considered coercion or discrimination for an employer to order all employees to listen to a speech or watch a video urging them to vote against representation Employees who refuse to attend, or who leave an employer's anti-union campaign meetings can be disciplined, including being fired. Employers may (and routinely do) exclude known union supporters from such meetings, not only to ensure no opposition to their anti-union message, but to create the impression of unanimous anti-union sentiment. While the employer cannot lawfully claim that it will close the plant or move the firm if the union wins the election, it can lawfully report on all of the other plants that have done so. Similarly, the law protects an employer's free speech right to comment on what has happened to employees at other firms who voted for a union.

At the same time, the law gives employers almost exclusive control over access to employees during the campaign period leading up to a representation election. While they may hold potential voters as captive audiences for eight hours a day, employers may also lawfully exercise their property rights over their workplaces to prohibit union organizers from entering during the entire course of a representation campaign, and prohibit employees from discussing the union among themselves except at break times.

Many of today's union organizing campaigns are thus characterized by the repeated employer message that if workers choose a union they will pay a price, both individually and collectively. An election conducted in a climate of fear in which one party has complete control over the other hardly meets the test of "democratic" process—although it may be a "legal" election.

A few examples drawn from the struggles of low-wage workers to exercise their right of self-organization demonstrate how the level playing field envisioned by the NLRA has turned into a hostile environment in which employers have a host of "lawful" weapons at their disposal to defeat their employees' efforts. Even where employees overcome these hurdles, at tremendous personal cost, and win a representation election, they are a long way from achieving an initial collection bargaining agreement.

Julia Lopez is a single mother of two daughters, ages 20 and 22 years. Originally from Managua, Nicaragua, Julia immigrated to the United States in 1973, and lives in Los Angeles, California. In 1980, she began working as a janitor at a large university, cleaning classrooms, scrubbing toilets and mopping floors. She continues to work at the university, but no longer as an employee of the university. On March 1, 1996, Julia became an employee of a janitorial contractor of the university.

The university is the largest private employer in the city, employing 17,170 people on its main and health campuses.

On March 1, 1996, the university contracted out all its janitorial work to a national corporation which specializes in institutional cleaning and landscaping. The janitors, many of them long-term employees (10–30 years) of the university, were told that their jobs and wages would be maintained. Since then, however, they have seen their real wages decline, have had their benefits eliminated or eroded, and many (including a number of strong union supporters) have been fired or laid off.

The university maintains it is no longer the employer of the janitors and is unable to stop the changes in working conditions brought on by its decision to subcontract the janitorial work on campus. Yet it has taken out full page ads in the campus newspaper supporting the contractor, obtained an injunction limiting union protests on its campus, and had union organizers arrested. Nonetheless, the campaign to organize a union for the the janitors continues in face of these odds.

Elisa Lopez is a single parent, mother of two children, ages five and six years old. She is a native of Mexico and lives in the San Francisco Bay area. In the spring and early summer of 1994, Elisa worked as a telemarketing employee for the Spanish-language telemarketing arm of a large company. Elisa lost her job in July 1994, when this multinational corporation closed the doors of its San Francisco location during an effort by the workers to organize a union.

In February of 1994, the 235 Latino/a employees in San Francisco, California, began their campaign to organize a union. Working in what came to be exposed as an "electronic sweatshop," these Spanish-language telemarketers were organizing a union around issues of pay and unfair treatment. Within months of starting their campaign, 70% of the workers had signed union authorization cards indicating their desire to be represented by the Communications Workers of America (CWA). The CWA petitions the NLRB for a representation election and an election date was set.

On July 14, 1994, eight days before the union representation election, the company shut the doors at the facility, throwing more than 200 workers out of work. The shut down was not the company's only violation of federal labor law. Its anti-union campaign was characterized by surveillance of union supporters, interrogation of workers about the campaign, open threats, and promises of benefits. During a hearing before an administrative law judge, the company unashamedly admitted to 50 such violations.

About two and a half years later, on December 27, 1996, the NLRB affirmed that the closing violated federal law, and ordered the company to rehire the workers with full back pay. The company immediately filed an appeal of the ruling that will keep the case bogged down in the legal system for many years.

Cathy Sharp is a single mother who has raised two sons alone since 1985. She and her boys live in San Diego beach community. A hospital in San Diego, California, has employed Cathy since 1976. She has worked in multiple roles, such as medical/surgical nursing, orthopedics, neurology, ICU, management and staff training. Cathy currently is a Clinical Nurse III, working in ICU specializing in heart and lung transplants.

In February, 1994, 2,500 nurses across the hospital system in San Diego started organizing with the help of AFSCME's United Nurses Association of California, when nursing practice began to erode dramatically, having a negative impact on patients and nurses. Soon thereafter, the hospital, a non-profit corporation, entered into a joint venture with the largest for-profit health care company in America.

On June 20–21, 1996, the nurses voted in a National Labor Relations Board election by a 2–1 margin (1,114 to 622) for union representation. The NLRB vote came after an intense campaign of delay and intimidation waged by the hospital and the health-care company.

Senior company executives have been quoted as saying they don't care whether their employees vote to unionize or not. The company will simply ignore the election results and refuse to bargain. The company, to date, has never negotiated a first collective bargaining agreement with employers who voted to form a union in an election conducted under the company's ownership. True to form, since the June 1966 election, the hospital has engaged in a series of delaying tactics aimed at denying indefinitely the nurses' right to collectively bargain with a duly elected representative.

Genuine labor law reform would restore the balance Congress intended to achieve in passing the NLRA, not by legitimizing further encroachment on free choice, as H.R. 3246 does, but by restricting the ability of employers to defeat their employees who choose to exercise their guaranteed rights. In short, true reform would recognize that employers remain free to control their workplaces through non-discriminatory hiring and firing, and the promulgation of neutral rules of conduct, but would also ensure that employers do not "under cover of th[at] right * * * intimidate or coerce * * * [their] employees." *Jones & Laughlin*, 301 U.S. at 45.

SPECIFIC PROVISIONS OF THE BILL

Title I—Truth in Employment

Title I of H.R. 3246 would permit employers to discharge or refuse to hire any employee who sought or obtained employment in order to promote union organization. It would, for the first time since the enactment of the Wagner Act in 1935, permit employers to discharge and refuse to hire employees because they intended to engage in union organizing. It would thus seriously undermine a fundamental purpose of the National Labor Relations Act—to protect the right of employees to organize and bargain collectively.

Title I is intended to end the practice of "salting," whereby union members seek employment from nonunion employers to organize their employees. Salting is an organizing tactic that has been in use for many decades in many different industries. E.g. *Baltimore*

Steamship Packet Co., 120 NLRB 1521, 1533 (1958); *Elias Bros. Big Boy, Inc.,* 139 NLRB 1158, 1164–65 (1962); *Sears Roebuck & Co.,* 170 NLRB 533, 533, 535 n.3 (1968). In recent years, its use in the construction industry has become widespread—not because the tactic is new—but to a large extent because recent legal developments have rendered other types of organizing in that industry less effective or more difficult.

In the construction industry, organizing has always been a difficult undertaking. Because jobs are short-lived and work is intermittent, it is nearly impossible for unions to engage in that type of organizing common in other industries involving lengthy campaigns culminating in an NLRB representation election. Because of these difficulties, Congress enacted Section 8(f) of the NLRA in 1959, permitting unions to employers in the construction industry to enter into prehire collective bargaining agreements (agreements entered into before the union demonstrates majority support or even before any employees are hired). Recent developments, however, have made prehire agreements less valuable as a means of organizing nonunion employers. In *John Deklewa & Sons, Inc.,* 282 NLRB 1375 (1987), enf'd, 843 F.2d 770 (3d Cir. 1988), the Board held that an employer could terminate a prehire bargaining relationship when the prehire agreement expires, unless the union had either won an NLRB election or obtained voluntary recognition based on a showing of majority support. After *Deklewa,* it became apparent that the key to organizing in the construction industry was reaching the employees of nonunion contractors whose demonstrated support the union needed to establish permanent bargaining relationships.

That task became far more difficult, however, after the Supreme Court decided *Lechmere, Inc,* v. *NLRB,* 502 U.S. 527 (1992), holding that non-employee organizers had no right of access to an employer's property and that employers could invoke state trespass laws to exclude union organizers from their property. Thus *Deklawa* made access to non-union employees critical to union organizing and *Lechmere* denied that access to non-employees. In response to these developments unions in the construction industry have turned to "salting"—using union members as volunteer organizers who seek employment with nonunion employers to organize their fellow employees during non-working time.

Those who participate in salting programs apply for jobs with nonunion contractors to explain to unorganized employees the benefits of union organization and persuade them to support the union's efforts to obtain recognition and a collective bargaining agreement from their employer. The efforts to obtain recognition may include a representation election, a recognitional strike, an unfair labor practice strike (if the employer commits unfair labor practices), or other lawful tactics, all of which are traditional means of obtaining recognition that have heretofore been protected by the NLRA. Employees engaged in salting (salts) also file unfair labor practice charges, if the employer commits an unfair labor practice, file complaints with OSHA, if the employer violates applicable safety regulations, and notify the appropriate authorities of any other observed unlawful activities. Employers have never before been permitted to discharge employees because they had reported, or might report, unlawful conduct by the employer.

Salts understand, when they apply for work, that they will be expected to fulfill the employer's legitimate expectations. Because union organizers do not want to give nonunion contractors an excuse to discharge them, and because they need to earn the respect of their coworkers, they are encouraged to be exemplary employees, to work efficiently and obey the employer's lawful work rules. The employer is free to promulgate work rules which all employees, including salts, must follow. Union activity can lawfully be prohibited in working areas during working times. Employees engaged in salting who do not comply with such rules or who are insubordinate or incompetent can be lawfully discharged on the same basis as other employees.

Nevertheless, some employers who have been the object of salting campaigns have complained about what they contend is the unfairness of salting. Many of the employer witnesses who appeared before the committee to complain about salting had themselves committed a number of serious unfair labor practices. One employer witness, for example appeared on behalf of a company called Nordic Electric to complain about salting. Prior to his appearance, however, the NLRB had issued a complaint against Nordic and an Administrative Law Judge had found that Nordic had discharged and refused to hire employees because of their support for the union, unlawfully interrogated employees and even threatened employees with violence. *Nordic Electric, Inc.,* NLRB Case No. 22–CA–20530. Another employer witness was a vice president of a company called Corey Delta, Inc. Prior to his appearance, the NLRB had issued a complaint against Corey Delta alleging that the company had committed numerous unfair labor practices. Among other things, it was alleged that Corey Delta had discharged 45 employees for engaging in union activities such as wearing union buttons, had unlawfully interrogated employees, told employees that the company's no-solicitation rule applied only to union activities, stated that the company intended to avoid hiring union members, and told employees that the company would "close its doors" before it would "go union." The witness himself was alleged to have promulgated an unlawful no-solicitation rule. See also the employers' unlawful responses to salting in *H.B. Zachry Co.,* 319 NLRB 967 (1995), enforced in pertinent part, 127 F.3d 1300 (11th Cir. 1997) and *Tualatin Electric, Inc.,* 319 NLRB 1237 (1995).[1]

It is apparent that those employers who object to salting do not object to any inherent unfairness of the practice; rather, they object to the fact that the law permits their employees to organize and prohibits them from discharging those employees who would, or might promote union organizing among their employees. Accordingly, what is at stake is not whether employers should be allowed to run their own work places in accord with neutral rules designed

[1] In *Tualatin,* union organizers had been admonished by their union to "work as hard for a nonunion contractor as they would for a union contractor, "try to make a favorable impression," and in particular not to engage in "sabotage . . . lying, stealing cheating, [or] obtaining information unlawfully." Nevertheless, the employer responded to the salting campaign by "referring to [the union] as organized crime trying to put him out of business and attempted "to eliminate wherever possible any personnel that were affiliated with the union." 319 NLRB at 1239.

to assure productivity and discipline. What is at sake is whether employers should be allowed to discriminate on the basis of suspected union membership and organizing activity. Congress settled that issue in 1935, and the law on that issue should not be changed now.

Title I of H.R. 3246 would, unquestionably, destroy the right to organize in the construction industry. It would permit employers to refuse to hire any applicants who were suspected of being union supporters and discharge any employees who attempted to promote union organizing. Those applicants who were, or had been, union members could, and would, be "blacklisted" by nonunion contractors. In short Title I would return construction industry employees to their status prior to the enactment of the Wagner Act, when union membership frequently cost employees their jobs.

The right of employees to engage in salting has been upheld, not only by the National Labor Relations Board, but also by the United States Supreme Court, which in *NLRB* v. *Town & Country Electric, Inc.,* 116 S. Ct. 450 (1995), unanimously held that the NLRA protects those engaged in salting. In the decision, Justice Breyer, writing for the unanimous Supreme Court stated:

> Can a worker be a company's "employee" * * * if at the same time, a union pays that worker to help the union organize the company? We agree with the National Labor Relations Board that the answer is yes.
>
> * * * * *
>
> The employer has no legal right to require that, as part of his or her service to the company, a worker refrain from engaging in protected activity. 116 S. Ct. 450.

That principle, which has been a cornerstone of labor relations for several decades, would be undone by Title I.

Title II—Fair Hearing

Title II's provision for a fair hearing creates confusion and delay in the representation process

Under Section 9(c) of the Act, 29 U.S.C. 159(c) (as the Majority correctly notes in Section 201 of H.R. 3246), the NLRB must conduct a pre-election hearing in all cases in which its "investigation" provides "reasonable cause to believe" a "question concerning representation exists" and the parties have not stipulated to a consent election. However, tracing the development of the Board's expertise over the course of more than 30 years compels rejection of the Majority's confusing and uncertain test for the appropriateness of a single-location unit. First, the factors that this proposal requires the Board to consider when determining whether to allow an election in a single-location unit do not in any way measure the appropriateness of such a unit. Second, and in every way related to the preceding objection, these factors serve no other purpose than to cause delay and confusion in the Board's election procedures, thus providing employers with yet another weapon in their arsenal to defeat an organizing campaign.

As the Supreme Court stated in *American Hospital Ass'n* v. *NLRB,* 499 U.S. 606, 610 (1991), "[t]he central purpose of the [National Labor Relations] Act [is] to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations." Thus, "the initiative in selecting an appropriate unit resides with the employees * * * [who] may seek to organize 'a unit' that is 'appropriate'—not necessarily *the* single most appropriate unit." Ibid. (Emphasis in original). It follows that the Board's task in determining whether the employees' requested unit is appropriate is "to insure to employees the full benefit of their right to self-organization and to collective bargaining." Id. at 611.

Given these principles, where employees take the "initiative in selecting an appropriate unit" by requesting a representation election for the employee group working together at a discrete location, the Board has "consistently found that a single-location unit in a multi-location enterprise is a *presumptively* appropriate unit for bargaining." *Haag Drug Company,* 169 NLRB 877, 878 (1968) (emphasis added). And while the Majority seeks to characterize this presumption as an "imprecis[e] blanket rule * * * [that] detracts from the * * * Act's goal of promoting stability in labor relations," Section 201(3), nothing could be further from the truth. As the Supreme Court has recognized in *AHA*, "rules that define in advance the portions of the work force in which organizing efforts may properly be conducted" facilitate "the Act's underlying policy, the goal of facilitating organization and recognition of unions." 499 U.S. at 613.

To test the applicability of this presumption in any given case, the Board has, time and time again, relied on three factors: geographic distance from facilities of the same employer; degree of temporary employee interchange; and local autonomy, as measured by the on-site presence of a statutory supervisor for a regular and substantial period. See 60 Fed. Reg. 50152. Thus, where the location in question is more than a mile away from another of the employer's facilities, there is no appreciable degree of employee interchange, and a supervisor within the meaning of the Act is present at the facility, it is reasonable to presume that the single-location demarcates "a natural or geographically based subdivision of an employer's employees," *NLRB* v. *Living and Learning Centers, Inc.,* 652 F.2d 209, 213 (1st Cir. 1981), and the employees who work there "form a homogeneous, identifiable, and distinct group." *Haag Drug*, 169 NLRB at 877.

The multi-factor test mandated by Title II, inasmuch as it incorporates a host of additional factors, including the catch-all "such other factors as the Board considers appropriate," is fundamentally at odds with the presumption in favor of single-location units. Indeed, it is nothing more than a conglomeration of an indeterminate number of factors designed to allow employers to slow down the process of holding a representation election. For example, "permanent employee interchange" creates no relevant ties between the employees who remain behind and those at the transferred employees' new work site, and so has no place in a rule designed to test the appropriateness of a single-location unit. Similarly, "centralized control" over labor relations has no logical place in the applicable test. In contrast to the factor of "local supervision," the structure of the employer's labor relations has "little or no direct relation to the employees' day-to-day work and employee interests in the conditions of their employment." *Haag Drug*, 169 NLRB at 878. Nor does inclusion of "common skills, functions and working conditions" do anything more than invite confusion, without advancing the Board's inquiry in a particular case. This factor addresses itself primarily to the production processes of the employer, which are largely irrelevant unless they affect the day-to-day interests of the employees; and if they do so, this will likely result in the geographic proximity of one facility to another, or in a high degree of temporary employee interchange. These factors are already included in a clear and meaningful test of single-location appropriateness. Moreover, the fact that employees at two or more locations have common skills, functions, or working conditions says little about whether they have sufficiently cohesive day-to-day interests that they should be allowed to vote for union representation on that basis.

At best, the multi-factor test set forth in H.R. 3246 sows legal confusion, defies consistent and principled application, generates needless litigation, and undermines the regulated parties' ability to conduct their affairs rationally and in accord with the law. It does, however, provide employers who are determined to resist the collective efforts of their workers with yet another weapon: the ability to cause delay and generate unnecessary complexity through the administrative process. An amendment that permits such tactics represents one more assault on the NLRA's fundamental guarantee of the right of organization, and has no place in the statute.

Title III—Justice on Time

Chairman Goodling has claimed that Title III, "Justice on Time," as well as the other three provisions of H.R. 3246 "is a narrowly drafted response to a specfic problem at [the NLRB]" and would "inject a greater measure of fairness into the relationship between [the NLRB] and small employers, small unions, and employees who may have been wronged for their union activities." The unfortunate reality is that "Justice on Time," as written, does little or nothing to speed up the pace of agency and judicial decision-making in illegal discharge cases, ignores the root causes of case-processing delays at the agency, and—as part of the Majority's "wish list" of amendments to the National Labor Relations Act—makes a mockery of the term "fairness."

The stated premise of Title III is a laudatory one: namely, that in recent years most illegally discharged employees are forced to wait "months and even years" to obtain reinstatement to their jobs and back pay "due to the lengthy delays in the processing of unfair labor practice charges," which causes a "chilling effect on the exercise of rights provided under Section 7" of the National Labor Relations Act and weakens "the effectiveness of the remedies for unlawful discrimination." Section 301. It is widely recognized that the illegal discharge of known union supporters during an organizing campaign is one of the most successful tactics utilized by employers to defeat their employees' efforts to form a union in the workplace; indeed, studies have shown that one out of every four employers combat organizational efforts by resorting to such illegal discharges. Each year, about 10,000 workers are illegally discharged for attempting to exercise their fundamental rights to form and join unions.

But the majority's bill falls woefully short of achieving "Justice on Time" for illegally discharged workers. A fundamental problem with the bill is that it only addresses delays in unfair labor practice case-processing at the NLRB, while it wholly ignores the problem that NLRB orders are not self-enforcing. When faced with a respondent who refuses to comply with an NLRB order directing the respondent to cease and desist from committing unfair labor practices and take appropriate affirmative action, the agency must obtain enforcement of its order from the appropriate federal court of appeals pursuant to Section 10(e) of the National Labor Relations Act, 20 U.S.C. Sec. 160(e). Thus, under the current statutory regime, even where the NLRB finds a violation of Section 8(a)(3) or Section 8(b)(2) of the Act and orders a remedy, the respondent may flout the NLRB's order with impunity until the court of appeals enforces the order one or two years later. Because the bill does not amend the National Labor Relations Act to make NLRB orders in cases involving illegal discharges self-enforcing, its "Justice on Time" label is a meaningless, inapt euphemism that will neither aid nor fool American workers.

Even at the administrative level, the bill imposes significant new burdens on the NLRB that will only hinder the agency's ability to decide illegal discharge cases more quickly. Not only does the bill require the NLRB to decide all but the most extremely complex illegal discharge cases within one year after the filing of the unfair labor practice charge, but it imposes onerous new reporting requirements on the NLRB for those case which take more than one year to decide. The Majority does not explain how the NLRB can reasonably be expected to meet these requirements given the fact that the Majority has consistently fought, with a large measure of success, to reduce the NLRB's staff and funding in recent years. In fact, the NLRB has lacked full funding since 1962, while the agency's caseload has increased 60% during that period; on the other hand, agency staff has decreased by more than one-third since Ronald Reagan was elected president. Obviously, the NLRB cannot continue to do more with less indefinitely, yet that is what this Majority proposal would require.

Even if NLRB orders were self-enforcing, another serious flaw with the bill is that it would still allow illegally discharged workers to remain unemployed for up to one year. This is simply unacceptable, both because of the dire consequences suffered by many such unemployed workers and the chilling effect that illegal discharges have on co-workers who are deterred from exercising their own Section 7 rights. As the Dunlop Commission unanimously recognized, speedy interim relief pending the outcome of the unfair labor practice proceeding is essential in such cases:

> Prompt injunctive relief will remove the coercive effect on employee free choice. The increased efficacy of this remedy will deter discriminatory behavior as well as rectify it, and will increase respect for the NLRB among the general public and its primary constituency—American workers.

During consideration of H.R. 3246, Congressman Kildee offered an amendment to address this issue. By amending Section 10(m) of the National Labor Relations Act to authorize the General Counsel, upon issuance of a complaint alleging an illegal discharge, to "make expedited application to the Board for" the employee's "immediate reinstatement," and the NLRB to "immediate[ly] reinstate[ ] * * * the employee, pending a final order disposing of the complaint," Congressman's Kildee's amendment would provide workers with the swift justice that has been so conspicuously absent under current procedures. Moreover, the requirement that the respondent employer or labor organization reinstate the victimized employee with treble back pay within 15 days after the NLRB issues its order would provide an effective deterrent to unlawful behavior. It likely would substantially reduce the number of American workers who are illegally fired each year for asserting their Section 7 rights from the current scandalously high number to a more acceptable level. And it would accomplish these desirable results without imposing an undue additional burden on the NLRB's increasingly scarce resources.

Title IV—Attorneys' Fees

Title IV requires that the NLRB pay the fees and expenses of small businesses (and unions) that prevail "in an adversary adjudication conducted by the Board," or "in a[n]y civil action, including proceedings for judicial review of agency action by the Board, brought by or against the Board." This provision would apply to employers or labor organizations with not more than 100 employees and a net worth of not more than $1.4 million.

As discussed above, Title IV, despite its stated intent to apply to "small businesses and labor organizations," achieves far broader coverage with its enlarged net worth and employee requirements. Moreover, there is not a scintilla of evidence to justify this radical departure from the American Rule, under which each party to litigation bears its own costs.

First, the Majority has come forward with nothing to demonstrate that the NLRB's prosecutorial discretion should be changed in this manner. Indeed, the statistics demonstrate otherwise. In Fiscal year '96, the overwhelming majority of unfair labor practice cases filed with the NLRB in the agency's field offices were disposed of within a median of 77 days without the necessity of formal litigation: 30.4 percent through dismissal before complaint, 30.1 percent through withdrawals before complaint, and 35.3 percent through settlements and adjustments. NLRB's FY '96 Report at 7. Moreover, in FY '96, 147 cases involving the NLRB were decided by the courts of appeals. Of these cases, the Board won 83.7 percent in whole or in part (compared to 72.5 percent in the preceding fiscal year) the courts remanded 4.1 percent were remanded entirely (compared to 7.5 percent in FY '95); and the Board lost 12.2 percent of cases in their entirety (compared to 20.0 percent in FY' 95). Id. At 17. This impressive record as a whole demonstrates the Board's careful selection of meritorious charges in which to proceed with issuance of a complaint, and the skill with which it prosecutes them. In addition, it refutes any notion that the Board has abused its statutory authority to enforce the Act through administrative and judicial proceedings.

Moreover, while the Board resolves the vast majority of cases either before issuance of a complaint or initiation of formal proceedings, there is no evidence to suggest that parties are unduly pressured into foregoing action on their charges. Settlements are often achieved by the employer's posting of a notice at the workplace. Indeed, of the 11,245 cases closed in Fiscal Year 1996, this remedial action was invoked in 3105 of them. FY '96 Report at 108.

Not only is there a total lack of evidence as to Board abuses that would warrant this unprecedented shifting of fees in NLRA litigation, but there is already a remedy for parties that prevail in litigation involving the Board, namely the Equal Access to Justice Act. 5 U.S.C. at 504. But not even EAJA goes as far as to penalize a government agency every time it loses. Under EAJA, the government must pay the prevailing party's fees and costs only in those situations in which the government's position was not "substantially justified," or where "special circumstances" would make fee-shifting unjust. Id. at 504(a)(1). Thus, Congress has never seen fit simply to shift the financial burdens of litigation to the government when it does not prevail, without regard to the merits of the government's position. Nor can it conjure up any reason whatsoever to single out proceedings involving the NLRB for imposition of such a rule.

The only conceivable rationale for passage of Title IV is the blatant attempt to chill the Board's exercise of its statutory responsibility to enforce the NLRA, by taxing it for every instance in which it attempts to do so unsuccessfully. Indeed, the Majority's proposal differs in name only from an outright assault on the Board's budget.

AMENDMENTS

In an effort to highlight the flaws in H.R. 3246, Democrats offered several amendments during committee consideration of the bill: an amendment by Representative Payne to strike title I; an amendment by Representative Clay to strike title II; an amendment by Representative Kildee to title III to provide reinstatement and increased penalties for illegally firing an employee for exercising protected rights; an amendment by Representative Scott to strike Title IV, and an amendment by Representative Andrews to penalize employers who refuse to bargain in good faith for a first contract after a union wins a representational election.

CONCLUSION

Despite its euphemistic name, H.R. 3246, the so called "Fairness for Small business and Employees Act," is not limited to small businesses and it certainly is not fair to employees. For the reasons outlined above, the Committee should not have reported H.R. 3246 and instead should direct its attention to real flaws in the NLRA, like its failure to provide meaningful penalties when employers illegally fire workers who try to organize unions, or when employers refuse to bargain in good faith for first contracts when unions win organizational elections.

WILLIAM L. CLAY,
DALE E. KILDEE,
MAJOR R. OWENS,
PATSY T. MINK,
TIM ROEMER,
LYNN WOOLSEY,
CHAKA FATTAH,
CAROLYN MCCARTHY,
RON KIND,
HAROLD FORD, Jr.,
GEORGE MILLER,
MATTHEW G. MARTINEZ,
DONALD M. PAYNE,
ROBERT E. ANDREWS,
BOBBY SCOTT,
CARLOS ROMERO-BARCELÓ,
RUBEN HINOJOSA,
JOHN F. TIERNEY,
LORETTA SANCHEZ,
DENNIS J. KUCINICH.